No. 09-

IN THE

Supreme Court of the United States

DONALD H. MacDERMID, Individually and as Administrator of the Estate of Nina Kay MacDermid,

Petitioner,

v.

DISCOVER FINANCIAL SERVICES d/b/a DISCOVER CHARGECARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

What are the limitations on the conduct of a credit card collection representative in efforts to collect on an unpaid credit card account?

Further, by the law of *stare decisis*, may a subsequent Sixth Circuit panel (in an unreported decision) disregard the holding in a previous reported decision in the same case?

In an economy riddled with consumer credit card defaults, are there limitations on threatening words which may be employed by representatives of a credit card company in their efforts to force payment on a delinquent credit card account?

In the present matter, it is alleged by the Petitioner that the Respondent issued credit cards, in response to an internet inquiry, to Nina Kay MacDermid despite an abysmal credit history. Mrs. MacDermid applied in her husband's name, as a co-obligor, but stated no false facts. It is medically documented that Nina Kay MacDermid had suffered for more than twenty (20) years with an unusual form of mental illness which manifested periodically in manic-depressive episodes. In experiencing those episodes, Ms. MacDermid would sometimes engage in bizarre spending sprees, often purchasing items for which she had no use. Upon extending (via purported internet application) approximately $25,000.00 in credit to Ms. MacDermid, Discover commenced vigorous collection efforts following the predictable default. Despite being told of Ms. MacDermid's illness, and her precarious mental

condition, Discover commenced a six month campaign of harassment which included repeated threats of criminal prosecution and jail if the credit card delinquency was not satisfied. Mrs. MacDermid's terror at the prospect of being jailed over the credit card debt is well documented in her psychiatrist's records. In June 2003, Ms. MacDermid committed suicide, after advising her psychiatrist that the pressure regarding the threats had become unbearable. The matter has been presented twice to the Sixth Circuit Court of Appeals for consideration. In the initial presentation (*MacDermid v. Discover Financial Services*, 488 F.3d 721 (6th Cir. 2007)), the Court correctly ruled that it is a per se violation of Tennessee law for a creditor to threaten criminal prosecution in its attempts to collect on a civil debt. The Court reversed the trial court's previous Rule 12 dismissal, and remanded the matter. Subsequently, the trial court granted summary judgment on the issue (*after* the deadline for dispositive motions) finding that, despite the first appellate ruling, the creditor's claimed "good faith belief" that Ms. MacDermid had violated the law in applying for the credit card in her husband's name would preempt entirely any claim for outrageous conduct by Ms. MacDermid's surviving spouse. Discover's representative admits, under oath, her awareness that the conduct was not criminal.

It is the position of the Plaintiff/Petitioner that the threat of criminal prosecution to collect a civil debt (particularly involving a mentally-infirm individual) constitutes per se outrageous conduct, and that any claim of the Respondent's good faith belief of a criminal act by the credit card applicant may not be resolved on

summary judgment. Intent in criminal culpability is a fact-driven issue. An early Supreme Court case (*Hyatt v. People*, 188 U.S. 691, 23 S.Ct. 456; 47 L.Ed. 657 (1903)) supports the contention that it is unlawful and fundamentally wrong to threaten criminal prosecution in efforts to collect civil debts. In a very changed, credit-driven economy, the inquiry regarding the rights of the consumer, and the limitations upon creditors, is even more relevant in the present commercial world.

Attached as Appendix "A" is the initial reported decision in the case of *MacDermid v. Discover Financial Services*, 488 F.3d 721 (6th Cir. 2007). It is the contention of the Petitioner that that decision properly defines the legal scope of the restrictions and limitations upon a creditor. Attached as Appendix "B" is the more recent decision cited by a different Sixth Circuit panel, which affirmed the trial court's grant of summary judgment, upon a finding that the creditor's claim of "good faith belief" justified dismissal of the case.

The issue has been thoroughly briefed by both parties at the trial and appellate level, and there are no cases cited by either side which directly address the limitations which should be imposed upon the conduct of a collections representative in attempts to collect a civil debt. It is an issue fundamentally important to consumer commerce.

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The initial opinion of the United States Court of Appeals for the Sixth Circuit is reported at *MacDermid v. Discover Financial Services*, 488 F.3d 721 (6th Cir. 2007). (App. C). Following remand of the case to the trial court, summary judgment dismissal was granted, and the Petitioner appealed again. Appendix A is the unreported decision in the case of *MacDermid v. Discover Financial Services*, unreported, U.S. Ct. App. 6th Cir. 2009, which was filed by the Sixth Circuit Court of Appeals on August 18, 2009. The district court opinions are reproduced in Appendix B and Appendix D.

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1). The Sixth Circuit's opinion was rendered on August 18, 2009.

STATEMENT OF THE CASE

A. ***Procedural History of the Case.*** Plaintiff Donald H. MacDermid, as Administrator of the Estate of his wife, Nina Kay MacDermid, filed a Complaint against Defendant Discovery Financial Services, d/b/a Discover Chargecard (hereinafter, "Discover") on October 9, 2003, in the United States District Court for the Middle District of Tennessee (Civil Action No. 1:03-0111) (Record Entry 1, ROA 1, Complaint). The Defendant initially responded with a Motion to Dismiss, pursuant to Rule 12(b)(6), contending that all of the Plaintiff's claims should be dismissed, as a matter of

law (Record Entry 9, ROA 9, Motion to Dismiss). Plaintiff filed a Response to the Defendant's Motion to Dismiss with a supporting Memorandum of Law, denying that the claims should be dismissed on the pleadings (Record Entries 15-16, ROA 15-16, Plaintiff's Response to Defendant's Motion to Dismiss). The Court entered an order which granted the Motion to Dismiss in part, but denied the remaining grounds for dismissal pending further discovery (Record Entries 19-20, ROA 19-20, Order and Memorandum). Plaintiff amended its Complaint (Record Entry 17, ROA 17), and Defendant subsequently filed its Answer (Record Entry 25, ROA 25), and an Amended Answer (Record Entry 50, ROA 50). Following the completion of discovery, the Defendant filed a Motion for Summary Judgment on the remaining (wrongful death) claims, pursuant to Rule 56 F.R.C.P. on February 6, 2006 (Record Entry 21, ROA 21). Following the briefing of those issues in the initial phase of the case, the trial court granted dismissal, resulting in the appeal of the decision in 2006 (Record Entry 69, ROA 69).

Attached is a copy of the Court's ruling in *MacDermid v. Discover Financial Services*, 488 F.3d 721 (6th Cir. 2007), in which the appellate court sustained portions of the trial court's ruling, but reversed the granting of the Defendant's Rule 12(b)(6) motion on the issues arising from Plaintiff's respective claims of outrageous conduct/intentional infliction of emotional distress. That decision confirms that the evaluation of both the creditor's conduct, and any claimed debtor culpability, *are fact issues*.

Upon remand of the case, by the decision of May 29, 2007, an order scheduling the matter for trial was entered (Record Entries 82-83, ROA 82-83). In compliance with the court's scheduling order deadline for the filing of dispositive motions ("*not later than January 14, 2008*"), the Defendant filed its second Motion for Summary Judgment on January 14, 2008 (Record Entry 84, ROA 84), supported by the Affidavit of Adonica Gilmore (Record Entry 87, ROA 87); a Statement of Undisputed Facts (Record Entry 86, ROA 86); and the Affidavit of Valerie Kokoszka (Record Entry 88, ROA 88), as well as excerpts from the deposition of the Plaintiff. Both affidavits are subject to serious credibility challenges.

Petitioner Donald H. MacDermid filed a Response to Defendant's Motion for Summary Judgment (Record Entry 91, ROA), supported by: the Deposition of Adonica Gilmore, with attachments (Record Entry 90, ROA 90); the Affidavit of Donald H. MacDermid, with attachments (Record Entry 92, ROA 92); the Affidavit of Dr. John Koomen, with attachments (Record Entry 93, ROA 93); the Affidavit of Jeffrey Zych (Record Entry 94, ROA 94); and the Plaintiff's Responses to the Defendant's Statement of Undisputed Material Facts (Record Entry 95, ROA 95). Petitioner filed a supporting Memorandum of Law (Record Entry 91, ROA 91).

The trial court initially denied Defendant's Motion for Summary Judgment regarding the parties' respective claims of intentional infliction of emotional distress/outrageous conduct, finding that genuine issues of material fact exist. The trial court observed that the

record was void of any evidence by the Defendant to confirm (in the context of the May 2007 appellate court opinion) that the Defendant could have reasonably believed that Mrs. MacDermid had engaged in any criminal conduct in the procurement of the cards, which would have justified threats of jail and criminal prosecution directed to both the husband and wife (Record Entry 104, ROA 104).

Thereafter, the parties proceeded with the preparation requirements set forth in the Court's scheduling order, in anticipation of a pre-trial conference date of April 28, 2008, and a scheduled jury trial date of May 13, 2008 (Record Entry 82, ROA 82). Following the trial court's entry of the above-referenced order, Defendant/Appellee Discover (outside the scheduling order deadline) filed a "Motion for Reconsideration" on April 25, 2008 (Record Entry 131, ROA 131), accompanied by a further Affidavit of Valerie Kokoszka. Plaintiff/ Appellant filed a response to the "Motion for Reconsideration" stating that the matters presented in the new affidavit constituted a further *untimely* Motion for Summary Judgment and addressed matters which the Court had previously considered in its March 2008 order denying Defendant's second Motion for Summary Judgment (Record Entry 135, ROA 135). On May 1, 2008, the trial court issued a memorandum opinion and order *granting* Defendant's Motion for Reconsideration and dismissing, with prejudice, the claims related to the Estate of Nina Kay MacDermid, finding that the materials submitted by the Defendant/Appellee, although untimely, would result in a dispositive effect if presented as a part of the Defendant's trial proof, and therefore, an appropriate basis for immediate dismissal (Record Entries 137-138, ROA 137-138).

That result occurred despite Defendant's late-filing of the Rule 56 motion, and Plaintiff's repeated protests regarding the documented falsity of the testimony of Discover representatives Gilmore and Kokoszka.

Plaintiff/Appellant filed a motion to alter or amend the Court's order on the Defendant/Appellee's motion for reconsideration (Record Entry 142, ROA 142), and the Defendant/Appellee responded (Record Entry 143, ROA 143). The trial court, in a memorandum opinion dated May 29, 2008, denied the Appellant's motion to alter or amend and affirmed its dismissal of the claims of the Estate of Nina Kay MacDermid (Record Entries 144-145, ROA 144-145). A timely Notice of Appeal was filed June 13, 2008 (Record Entry 146, ROA 146).

REASONS FOR GRANTING THE PETITION

Over 100 years ago, this Court ruled in the case of *Hyatt v. People*, 188 U.S. 691, 23 S.Ct. 456; 47 L.Ed. 657 (1903), that it is improper for a creditor to assert threats of criminal prosecution in an attempt to cause a debtor to pay his debt. That fundamental rule has never been specifically modified or diluted in any subsequent Supreme Court or appellate level opinion:

> If, however, the question of supposed public policy were entitled to any weight in discussing a question of the meaning of the clause of the constitution affecting the liberty and safety of the citizen, it might be urged that the collection of civil debts by a threat of criminal prosecution, is a practice not infrequently indulged by attorneys of the

> baser sort, and by businessmen of not very high principal, and that any rule which rendered possible to transportation of persons for trial to a distant portion of the union, whenever there is a business dispute as to the truth of a warranty or representation made in correspondence, would vastly encourage this species of blackmail. That compounding a felony is a crime, seems to be an obsolete rule of law, in certain enterprising commercial centers.

Hyatt v. People, 188 U.S. 691, 23 S.Ct. 456; 47 L.Ed. 657 (1903).

Given our nation's current economic climate and national focus on economic financial issues affecting consumers and creditors, it is particularly significant for the Court to address and reaffirm the recognition that there are reasonable limitations upon the conduct, words and manner (whether express or implied) of creditors who prey upon consumers. The Defendant's conduct particularly egregious for the following reasons:

(a) Defendant solicited an on-line internet application from a mentally debilitated individual, with an abysmal credit history, and issued $25,000.00 in credit with no signature or other direct authorization. The internet inquiry stated no false facts. The approval was based upon Ms. MacDermid's completion of a "joint" application, which listed her husband as the primary card holder, with no written approval form or other confirmation of approval by the co-obligor;

(b) Upon the occurrence of the predictable default, Discover was apprised, in substantial detail, of the precarious mental condition of Nina Kay MacDermid, and the fact that she was under the care of a psychiatrist for her problems;

(c) Discover intensified a campaign of harassment and threats, which included repeated threats of criminal prosecution and jail, if the bill was not paid;

(d) Discover's representative (Adonica Gilmore) admits her personal awareness (in sworn testimony) that Ms. MacDermid's conduct was not criminal, as Gilmore discussed the matter with the local district attorney's office which confirmed that Ms. MacDermid had not engaged in criminal conduct;

(e) The psychiatric records of Nina Kay MacDermid confirm that her suicide was a culmination of the stress and fear which she was experiencing due to the threats of criminal prosecution and jail;

(f) The belatedly-filed Affidavit of Ms. Kokoszka suspiciously contains content which varies from the original presentation of the internet application form. The decision of the second Sixth Circuit panel to accept that form as a legal conclusion of guilt (with no *factual* inquiry into

> the alleged "criminal" intent of Mrs. MacDermid), offends basic considerations of fairness and due process, and is directly contrary to the remand instructions in the earlier reported appellate decision in the case. With clearly-defined standard announced by initial first Sixth Circuit reported decision, the application of *stare decisis* compels the subsequent Sixth Circuit panel to abide by the standards set forth in that earlier reported decision. *Rutherford v. Columbia Gas*, 575 F.3d 616 at 617 (6th Cir. 2009). *Carlsbad Technology v. HIF Bio*, 129 S.Ct. 1862, 173 L.Ed. 843, 77 USLW 4382 (2009).

The authorities presented in the briefs of each party in both appeals to the Sixth Circuit confirm that the law is unsettled and not clearly defined in the application of the above-described facts to a claim of outrageous conduct under Tennessee law.

The position of the Plaintiff/Petitioner is that repeated threats of criminal prosecution in an attempt to collect a civil debt constitutes per se outrageous conduct.

The position of the Defendant/Respondent (as adopted by the second Court of Appeals decision) appears to be that a mere expression of "good faith belief" that the victim had violated the law is sufficient to evade responsibility on a claim of outrageous conduct.

CONCLUSION

The Petition for Writ of Certiorari should be granted in order to obtain clarification of this Court's ruling in the 1903 case of *Hyatt v. People*, 188 U.S. 691, 23 S.Ct. 456; 47 L.Ed. 657 (1903), as it relates to creditor/debtor issues in the current economic climate.

Respectfully submitted,

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APPENDIX

Financial Services. Plaintiff specifically argues that a material question of fact exists as to whether Discover's threats of criminal prosecution against his wife during debt collection constituted outrageous conduct under Tennessee law. For the following reasons, we AFFIRM the district court's decision to deny Plaintiff's Motion to Alter or Amend.

I.

A. Factual Background

In the summer of 2002, Nina Kay MacDermid ["Mrs. MacDermid"], the late wife of Plaintiff-Appellant Donald H. MacDermid ["Plaintiff"], submitted three separate Internet applications for Defendant-Appellee Discover Financial Services, LLC ["Discover"] credit cards. ROA 151-52, 984-85. The application contained terms of use which required that "the information being submitted [be] true and accurate." ROA 704. It was a violation of those terms to request "issuance of a Discover credit card in a party's name without that party's consent or knowledge." *Id.* On each of the three applications, Mrs. MacDermid listed her husband as the "Primary Applicant" and listed herself as an "Authorized Buyer." ROA 986-97. She also provided her husband's birth date and social security number. *Id.* All three credit cards were established in Plaintiff's name as individual accounts, rather than joint accounts shared between the couple. ROA 985. Plaintiff did not apply for the credit cards and the applications submitted to Discover were made "without his knowledge or permission." MacDermid Brief App'x Vol. I, 6; ROA 141, 144.

Appendix A

After receiving the Discover cards in late summer 2002, Mrs. MacDermid made a series of purchases on the newly established accounts totaling approximately $15,000, without her husband's knowledge. ROA 152-54. The record does not indicate that Plaintiff or Mrs. MacDermid made payment to Discover for these charges.

Plaintiff alleged that between February 2003 and June 2003, Discover collection representatives, particularly Ms. Adonica Gilmore ("Ms.Gilmore"), repeatedly phoned the MacDermid residence and threatened Plaintiff and his wife with criminal prosecution if they refused to pay the outstanding debt owed on the Discover accounts. ROA 501. Plaintiff stated that Ms. Gilmore specifically threatened criminal prosecution on April 9, 2003, when Ms. Gilmore told Plaintiff regarding Mrs. MacDermid, "I don't think you want [Mrs. MacDermid] going . . . well you know." ROA 502. It was further alleged that Ms. Gilmore stated that if the matter could not be resolved, " 'I'll just call [a representative of the Giles Country District Attorney's Office] and have the authorities 'take a little trip out to your house.' " ROA 502. At some point during spring 2003, Ms. Gilmore filed a police report with the Giles County Sheriff Office based upon Plaintiff's statements to her that he had not authorized or consented to his wife obtaining the credit cards in his name. ROA 702-03, 730. A representative from the Giles County District Attorney's office later told Ms. Gilmore that no fraud had been committed. ROA 731.

Appendix A

On June 13, 2003, Mrs. MacDermid committed suicide using a hand-gun she had purchased. ROA 120, 239, 383. She left behind a handwritten note to Plaintiff explaining the "pressure just got the best of me." ROA 383. The note did not mention Discover, credit cards, collection efforts, threats of jail, or fear of incarceration. ROA 383.

Dr. John Koomen, the psychiatrist treating Mrs. MacDermid in the months preceding her death, provided a sworn statement that her medical history indicated a "history of bipolar disease, which had resulted in prior hospitalizations followed by periods of relative stability." ROA 486. One manifestation of this condition was episodes of "extreme financial irresponsibility." *Id.* Dr. Koomen observed that Mrs. MacDermid was "terrified at the prospect of going to jail and causing further embarrassment to her family, particularly her husband." ROA 487. He concluded based on his medical expertise that the allegations of credit card fraud "appeared to be the primary stressor which contributed to the deterioration of her emotional and mental condition in April and May 2003." ROA 488. Dr. Koomen further testified that it was "more probable than not, with reasonable medical certainty, that the precipitating factor in the causation of the death of Nina Kay MacDermid were the threats of criminal fraud prosecution and incarceration" by Discover's collection representatives. *Id.*

B. Procedural History

Following Mrs. MacDermid's suicide, Plaintiff filed this diversity action against Discover in the Middle District of Tennessee on October 9, 2003, raising several claims in his individual capacity and in his capacity as administrator of the estate of his deceased wife. The district court summarized the lengthy sequence of events leading up to its ruling on Discover's Motion to Reconsider, which Plaintiff ultimately challenges in the instant appeal:

> In [his] Complaint, Plaintiff raised claims of outrageous conduct and intentional infliction of emotional distress, violation of the Tennessee Consumer Protection Act, fraud and civil extortion, violation of the Fair Debt Collection Practices Act, and common law credit defamation/libel. The Court granted Defendant's Motion to Dismiss the intentional infliction of emotional distress and Tennessee Consumer Protection Act claims. The Court subsequently granted Defendant's Motion for Summary Judgment with regard to the other claims asserted by Plaintiff. [*MacDermid v. Discover Fin. Servs. ("MacDermid I")*, No. 1:03-0111, 2006 WL 1454743 (M.D.Tenn. May 12, 2006).]
>
> Plaintiff appealed to the Sixth Circuit, which affirmed all the dismissals except the intentional infliction of emotional distress

claim. *See MacDermid v. Discover Fin. Servs. [("MacDermid II")]*, 488 F.3d 721 (6th Cir.2007). The Sixth Circuit stated in part as follows:

> We cannot agree with the dismissal of the outrageous conduct claim at the [Rule] 12(b)(6) stage. While Discover is correct that it was actually owed the debt in question, we disagree with its contention that Mrs. MacDermid was necessarily criminally liable for credit card fraud. As such, Mr. MacDermid has at least stated a claim for outrageous conduct based on Discover's threats of criminal prosecution for failure to pay a purely civil debt.
>
> . . .
>
> It would seem that something beyond the pleadings is required for Discover to show that Mrs. MacDermid had in fact committed fraud against the company—for example, via a copy of the on-line application and an explanation of the material misrepresentations contained therein.

488 F.3d at 729, 731-32.

After remand, the parties engaged in additional discovery and Defendant filed a Motion for Summary Judgment seeking to dismiss Plaintiff's claims for outrageous conduct. On April 3, 2008, the Court entered an Order granting in part and denying in part Defendant's Motion for Summary Judgment. *[MacDermid v. Discover Fin. Servs. ("MacDermid II")*, No. 1:03-0111, 2008 WL 918489 (M.D.Tenn. Apr. 3, 2008).] The Court granted the Motion to the extent that Plaintiff's individual claims against Defendant were dismissed, except for his claim based upon Defendant's threats of jail and criminal prosecution directed to him. The Court also granted the Motion to the extent that Plaintiff's claims concerning threats by Defendant of civil litigation against Mrs. MacDermid were dismissed. In all other respects, however, the Motion for Summary Judgment was denied. The effect of that denial was to leave in place Plaintiff's individual claims for outrageous conduct and Plaintiff's claims, as Administrator of Mrs. MacDermid's Estate, for outrageous conduct based upon Defendant's threats of criminal prosecution directed to her.

On April 25, 2008, Defendant filed a "Motion to Reconsider", asking the Court to reconsider its Order denying Defendant's Motion for Summary Judgment. With the

> Motion to Reconsider, Defendant submitted the Affidavit of Valerie Kokoszka ["Ms. Kokoszka"] and three Exhibits—the Internet applications submitted by Ms. MacDermid.

MacDermid v. Discover Fin. Servs. ("MacDermid V"), No. 1:03-0111, 2008 WL 2235332, at *1-2 (M.D.Tenn. May 29, 2008).

The district court granted Discover's Motion for Reconsideration and dismissed with prejudice, on summary judgment, Plaintiff's claim of outrageous conduct in his capacity as Administrator of Mrs. MacDermid's Estate. *MacDermid v. Discover Fin. Servs. ("MacDermid IV")*, No. 1:03-0111, (M.D.Tenn. May 1, 2008); ROA 1019. The district court reconsidered its prior denial of summary judgment because of its finding that the newly submitted exhibits and affidavit of Ms. Kokozska, a Discover Department manager who handled fraudulent claims, established that Mrs. MacDermid's conduct appeared to violate various provisions of the Tennessee criminal code, specifically Tenn.Code Ann. § 39-14-118(a) and (b)(4), relating to fraud, as well as Tenn.Code Ann. § 39-14-150, pertaining to identity theft. ROA 1017-19. Accordingly, the court concluded Discover's "threats to criminally prosecute Ms. MacDermid could not, as a matter of law, constitute outrageous conduct." ROA 1019.

On May 5, 2008, the district court granted Plaintiff's motion for voluntary dismissal without prejudice of his claim for outrageous conduct asserted in his individual

capacity. ROA 1025-26. That same day, Plaintiff filed a Motion to Alter or Amend the district court's order granting Discover's Motion for Reconsideration. ROA 1027-33. He argued that the record did not support the conclusion that, as a matter of law, Mrs. MacDermid was guilty of a criminal act. ROA 1030-32. In denying Plaintiff's Motion to Alter or Amend on May 29, 2008, the district court declared:

> [i]t was not necessary for [Discover] to prove that Ms. MacDermid was actually "guilty" of anything, nor was it necessary for the Court to make any ruling with regard to this issue. The fact that Ms. MacDermid's conduct fit precisely into the language of several criminal statutes indicates that [Discover] could have reasonably prosecuted Ms. MacDermid had it chosen to do so. Under those circumstances, no reasonable juror could find that Defendant committed outrageous conduct in threatening to do so, and summary judgment in Defendant's favor was mandated.

MacDermid V, 2008 WL 2235332, at *7. Plaintiff timely appealed. ROA 1059.

II.

"While [we] generally review[ ] the denial of a Rule 59(e) motion to alter or amend a judgment for an abuse of discretion, [we apply] a *de novo* standard of review [ ] when the Rule 59(e) motion seeks review of a grant of

summary judgment." *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1047 (6th Cir.2001).

"The question on summary judgment is whether the moving party has demonstrated that the evidence available to the court establishes no genuine issue of material fact such that it is entitled to a judgment as a matter of law." *Dobrowski v. Jay Dee Contractors, Inc.*, 571 F.3d 551, 554 (6th Cir.2009). The party moving for summary judgment bears the initial burden of showing there is no material issue in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In evaluating a party's motion for summary judgment, this court "must view the facts and any inferences reasonably drawn from them in the light most favorable to the party against whom judgment was entered." *Kalamazoo Acquisitions v. Westfield Ins. Co.*, 395 F.3d 338, 342 (6th Cir.2005).

Because we sit in diversity, we apply the law of the forum state of Tennessee when reviewing Plaintiff's outrageous conduct claim. *See Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 302 (6th Cir.2008).

III.

The sole cause of action before this Court is Plaintiff's claim for intentional infliction of emotional distress made in his capacity as Administrator of the Estate of Mrs. MacDermid. He argues that a genuine issue of material fact exists as to whether Discover's conduct toward Mrs. MacDermid was sufficiently outrageous so as to give rise to tort liability. Accordingly,

he claims the district court erred in granting Discover summary judgment and in denying his Motion to Alter or Amend.

As this Court stated in *MacDermid II*, "Tennessee state courts recognize the tort of intentional infliction of emotional distress, although they typically refer to this tort as 'outrageous conduct.' " 488 F.3d at 729 (citing *Bain v. Wells*, 936 S.W.2d 618, 622 n. 3 (Tenn.1997)). "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Bain*, 936 S.W.2d at 622 (quoting Restatement (Second) of Torts § 46(1)). To prove liability for outrageous conduct under Tennessee law, a plaintiff must prove: (1) the conduct complained of was intentional or reckless; (2) the conduct was so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of resulted in serious mental injury. *Id.*

Plaintiff argues on appeal that the district court erred when it ruled Discover's conduct during debt collection did not satisfy the second element of the test as a matter of law. As the Tennessee cases establish, "[t]he outrageous conduct requirement is a high standard which has consistently been regarded as a significant limitation on recovery." *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 39 (Tenn.2005). Liability does not arise for "mere insults, indignities, threats, annoyances, petty oppression or

other trivialities." *Bain*, 936 S.W.2d at 622 (quoting *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270, 274 (Tenn.1966)). Nor is it

> enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'

Id. at 623 (quoting *Medlin*, 398 S.W.2d at 274 (quoting Restatement (Second) of Torts § 46 cmt. d (1965))).

Plaintiff argues that the tactics employed by Discover during debt collection constituted "outrageous conduct." In particular, he takes issue with the alleged threats of criminal prosecution levied against Mrs. MacDermid by Discover collection representatives between February 2003 and June 2003. Tennessee

courts have previously recognized that aggressive debt collection practices can give rise to liability for outrageous conduct. *See, e.g., Moorhead v. J.C. Penny Co.*, 555 S.W.2d 713, 717-18 (Tenn.1977). In general, a "creditor has a right to urge payment of a just debt, and to threaten to resort to proper legal procedure to enforce the obligation." *Id.* at 718 (internal citation omitted). By extension, a creditor is not liable for injuries resulting from an attempt to collect by "reasonable means." *Id.* But a creditor can be held liable if it resorted to "improper methods" to collect a debt. *Id.* As elaborated upon by the Tennessee Supreme Court:

> the view generally taken is that improper methods used to collect a debt may be the basis for the maintenance of an action for a mental or emotional disturbance produced thereby, or for a bodily injury or illness resulting from such mental or emotional disturbance, especially where the circumstances attending the effort to collect the claim are such as to invoke the general rule that one who wilfully or intentionally causes great emotional distress, *without justification*, is liable for such injuries.

Id. (emphasis added).

We applied the above principles in *MacDermid II* and found, in relevant part, that allegations of "false threats by Discover employees of *criminal* prosecution"

were sufficient to make a claim for outrageous conduct at the pleading stage. *See* 488 F.3d at 731. As the parties agree, a creditor may not threaten criminal prosecution solely for "failure to pay a purely civil debt ." *See id.* at 729. Discover had argued, however, that criminal prosecution of Mrs. MacDermid was warranted because Mrs. MacDermid had "committed credit card fraud by unlawfully submitting Plaintiff's personal information to obtain the credit cards from Discover via the internet." *Id.* But the Court refused to dismiss the claim on this ground because it concluded that "something beyond the pleadings is required for Discover to show that Mrs. MacDermid had in fact committed fraud against the company." *Id.*

MacDermid II did not deny Discover's motion to dismiss because it found that threats of criminal prosecution during debt collection were outrageous per se. Rather, the Court found dismissal of Plaintiff's claim of outrageous conduct on behalf of his wife's estate inappropriate at the pleading stage because Discover had not offered actual evidence that Mrs. MacDermid committed fraud. *See id.* Nevertheless, the Court left the door open for Discover to offer such evidence by expressly suggesting that fraud could be proven through submission of Mrs. MacDermid's "on-line application and an explanation of the material misrepresentations contained therein." Id at 732. The Court held, consistent with Tennessee law, that threatening criminal prosecution during debt collection

is not a basis for tort liability as a matter of law when such prosecution would be justified.[1]

It is notable that *MacDermid II* emphasized that Discover's threats of prosecution must be based upon criminal conduct directed at Discover, rather than at Plaintiff, for them to be justified. *Id.* at 731-32. Specifically, the Court stated Discover needed to produce evidence "to show that Mrs. MacDermid had in fact committed fraud *against the company*" in order for Plaintiff's claim to be dismissed as a matter of law. *Id.* (emphasis added). The Court further remarked:

> if Discover is somehow alleging that Mrs. MacDermid committed fraud on her husband as opposed to the company, then we do not

1. Plaintiff allocates a substantial portion of his brief summarizing cases dealing with claims of outrageous conduct in the context of debt collection, none of which involve threats of criminal prosecution. The extent of Plaintiff's actual application of these cases to the instant facts appears to be a cursory analogy to *Moorhead*, where the Tennessee Supreme Court held that a claim for outrageous conduct survived summary judgment when there was evidence that the creditor aggressively pursued collection of a non-existent debt against the plaintiffs. *See Moorhead*, 555 S.W .2d at 717. *MacDermid II* already found *Moorhead* inapplicable to the instant case because Discover had a legitimate right to pursue payment against Mrs. MacDermid. 488 F.3d at 731. Plaintiff has not offered any reason why we should revisit this issue nor why we should not accept *MacDermid II's* broader holding that threats of criminal prosecution do not constitute outrageous conduct when justified.

> see how Discover could reasonably suggest to Mr. MacDermid that criminal fraud charges would be pursued against Mrs. MacDermid on his behalf, unless of course he had consented to such action.

Id. at 732. In other words, MacDermid II held Discover could not vicariously assert Plaintiff's rights as a victim under Tennessee criminal law unless he consented to it. *See id.*

In her affidavit, Discover collection representative Adonica Gilmore claimed that a criminal complaint was filed against Mrs. MacDermid based on Plaintiff's statement that his wife had committed fraud against him. *See* ROA 703. Discover also suggests this in the brief it filed with this Court. But Plaintiff repeatedly denied that Mrs. MacDermid had defrauded him during his deposition. ROA 181-82. He instead claimed it was Discover who committed fraud by issuing the cards in his name without his consent. ROA 186, 217, 291.

On three occasions between February and March 2003, Discover requested Plaintiff to sign a prepared affidavit and assist in the prosecution of Mrs. MacDermid for fraud. ROA 402-06. There is no evidence, however, that Plaintiff complied with this request. ROA 403 (affidavit left blank and unsigned). Moreover, in a letter dated March 3, 2003, Plaintiff plainly indicated to Discover that he would not assist in the prosecution of his wife. ROA 401. He testified to the same during his deposition. ROA 333-35. In light of this evidence, there

is at least a genuine issue of fact, if not conclusive establishment of one in Plaintiff's favor, that Plaintiff did not consent to the prosecution of his wife. Therefore, Discover's threats of criminal prosecution must stem from criminal conduct committed by Mrs. MacDermid against the company, rather than against Plaintiff, for Discover to be shielded from outrageous conduct liability.

A. Evidentiary Standard

Plaintiff does not challenge the conclusion of *MacDermid II* that justified threats of criminal prosecution during debt collection are not grounds for outrageous conduct. Nor does Discover contest the inverse proposition that unjustified threats of criminal prosecution would establish Discover's conduct as outrageous. Thus, the instant appeal hinges on whether Discover had grounds to file a criminal complaint against Mrs. MacDermid such that its threats of criminal prosecution were justified.

A key issue before the Court is which evidentiary standard to apply in deciding whether Discover's threats of criminal prosecution were justified.[2] It does not appear Tennessee courts have addressed this

2. The district court denied Plaintiff's Motion to Amend or Alter based on its finding that Mrs. MacDermid could have been "reasonably prosecuted" under Tennessee's criminal code "had [Discover] chosen to do so." *MacDermid V*, 2008 WL 22355332, at * 7. But the district court did not elaborate upon what it meant by "reasonably prosecuted" nor did it cite to Tennessee authority for this proposition.

precise issue. Nevertheless, we are not without guidance as they have previously analyzed civil claims for outrageous conduct based on a defendant's *actual causation* of criminal prosecution, rather than mere threat of one, under a malicious prosecution framework. *See Southeastern Mfg. & Indus. Supply v. Equifax*, 1984 Tenn.App. LEXIS 3375, at *13-16 (Tenn.Ct.App. Dec. 28, 1984). Malicious prosecution, which involves the question of civil liability for those who trigger the criminal prosecution of innocent persons, bears relevance to the case at bar because Plaintiff essentially argues that Mrs. MacDermid was innocent of criminal conduct and that she could not have been legitimately prosecuted had Discover carried out its threats to do so.

To sustain a successful claim of malicious prosecution, in addition to showing the defendant brought the action with "malice" and that the underlying criminal prosecution terminated successfully in plaintiff's favor, one must demonstrate an absence of probable cause. *Roberts v. Federal Express Corp.*, 842 S. W.2d 246, 247-48 (Tenn.1992) (involving an employee's suit against his employer for causing his arrest for grand larceny); *see Schlueter v. S. Energy Homes, Inc.*, 252 Fed. App'x 7, 9 (6th Cir.2007) (recognizing Tennessee law requires the absence of probable cause to maintain a malicious prosecution claim). Probable cause is established where "facts and circumstances [are] sufficient to lead an ordinarily prudent person to believe the accused was guilty of the crime charged." *Id.* at 248 (internal citation omitted). Applying this objective

standard to the case at bar, Discover would be justified in threatening Mrs. MacDermid with criminal prosecution for purposes of the outrageous conduct claim if an ordinarily prudent person could believe she was guilty of criminal conduct. It must be emphasized that actual guilt or innocence of the target of the prosecution is immaterial to a probable cause determination. *See Lantroop v. Moreland*, 849 S.W.2d 793, 797 (Tenn.App.1992). All that matters is whether Mrs. MacDermid could have been legitimately prosecuted, not necessarily convicted, at the time Discover made its threats.

B. Application of Probable Cause

In granting Discover's Motion for Reconsideration, the district court cited three separate provisions of the Tennessee criminal code, which it determined Mrs. MacDermid violated: (1) Tenn.Code Ann. § 39-14-118(a) and (b)(4); and (2) Tenn.Code Ann. § 39-14-150. ROA 1016-19. Because we find there was probable cause to prosecute Mrs. MacDermid under § 39-14-118(a) and (b)(4), we need not decide whether grounds similarly existed under § 39-14-150.

Section 39-14-118 governs the unauthorized use and possession of credit cards. Part (a) states that "[a] person commits the crime of illegal possession of a credit or debit card who, knowing the person *does not have the consent of the* owner or *issuer*, takes, exercises control over or otherwise uses that card or information from that card." Tenn.Code. Ann. § 39-14-118(a) (emphasis

added). Part (b)(4) of § 39-14-118, on the other hand, prohibits the "fraudulent use" of a credit card by an individual if he or she does so with the knowledge that use of the card is "unauthorized by either the issuer or the person to whom the credit or debit card is issued." (emphasis added).[3]

An "issuer" refers to "the business organization or financial institution or its duly authorized agent which issues a credit or debit card." Tenn.Code. Ann. § 39-14-102(5). In this case, the business organization issuing the card was Discover. The reference to "issuer" in § 39-14-118 indicates the provisions protect Discover's rights against fraudulent possession and use of its credit cards, in addition to those of the cardholder. Consequently, as discussed above, Discover would not have needed Plaintiff's consent to cause Mrs. MacDermid's prosecution under the statute. *See MacDermid II*, 488 F.3d at 732 (requiring Plaintiff's consent to the extent Discover's threats of criminal prosecution were premised on violations of his, rather than Discover's, rights under criminal law).

3. Tenn.Code Ann. § 39-14-118(b) states in relevant part: "A person commits the crime of fraudulent use of a credit or debit card who uses, or allows to be used, a credit or debit card or information from that card, for the purpose of obtaining property, credit, services or anything else of value with knowledge that. . . . (4) For any other reason the use of the card is unauthorized by either the issuer or the person to whom the credit or debit card is issued."

Appendix A

Undisputed evidence in the record establishes there was probable cause to prosecute Mrs. MacDermid under both § 39-14-118(a) and (b)(4). Plaintiff admits that he did not apply for Discover credit cards and that he did not authorize his wife to obtain the credit cards at issue on his behalf. ROA 144; Plaintiff's Br. App'x, Vol. I, 6-7. This is significant because the electronic credit card application on Discover's website contained terms of use, which included a certification that any information submitted was true and accurate. ROA 704. These terms are violated when an applicant requests issuance of a card without consent or knowledge of the named cardholder. *Id.* According to copies of Mrs. MacDermid's credit card applications and the sworn statement of Valerie Kokoszka, the Discover manager who handled fraud claims, Mrs. MacDermid filled out three applications on Discover's website requesting credit cards solely in Plaintiff's name. ROA 984-97. Although Plaintiff claims in his brief the cards were joint accounts shared between he and his wife, all of the evidence in the record indicates she was merely an "Authorized Buyer" for the accounts.[4] ROA 984-97.

By requesting a credit card in Plaintiff's name without his consent or knowledge, Mrs. MacDermid

4. Plaintiff claims that *MacDermid II* established a series of factual propositions, including that Mrs. MacDermid "applied for a joint credit card." ROA 33. But *MacDermid II* merely held that it could not grant a Rule 12(b)(6) motion for Plaintiff's claim of outrageous conduct based on the allegations in his complaint. *See* 488 F.3d at 729, 732. It did not establish the existence of any facts.

violated Discover's terms of use and was accordingly deprived of Discover's consent and authority to possess and use its credit cards.[5] While Plaintiff argues that nothing in the record indicates Mrs. MacDermid made a "false or fraudulent statement" to Discover or that she signed any document affirming the truthfulness of her application, he ignores the uncontroverted fact that Mrs. MacDermid was required to electronically certify the truthfulness of the information she provided. In light of these circumstances, the Court finds that the weight of the evidence would "lead an ordinarily prudent person to believe" that Mrs. MacDermid had committed fraudulent possession and use of a credit card under § 39-14-118(a) and (b)(4). Therefore, there was probable cause that she engaged in criminal conduct such that threats of prosecution would have been justified.

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5. One could argue, although Plaintiff does not, that there is a lack of evidence in the record to establish that the violation of the terms of use necessarily meant that her possession and use of the cards was not "authorized" by Discover given that the terms of use are not actually in the record. In other words, we should infer that Mrs. MacDermid could have lied on her application and violated the terms of use while still enjoying authority to possess and use the Discover credit cards. The Court finds this not to be a "reasonably drawn" inference from which the nonmoving party may benefit on summary judgment. *See Kalamazoo Acquisitions*, 395 F.3d at 342. The very phrase "terms of use" indicates that authority to use the card is conditioned on compliance with the terms set forth by the credit card company. Therefore, we decline to find this minor imperfection in the record as grounds for a genuine issue of material fact.

C. Jury Determinations of Probable Cause

Plaintiff does not meaningfully dispute that the evidence, viewed in a light most favorable to him, supported the existence of probable cause under § 39-14-118(a) and (b)(4). Indeed, he does not mention either of these provisions in his brief, much less analyze their application to the case at bar. Plaintiff does contend, however, that a jury determination is required to resolve factual issues, such as Mrs. MacDermid's intent, in order to ascertain if she engaged in prosecutable conduct. Accordingly, he denies the suitability of deciding probable cause on summary judgment.

Tennessee courts hold that a jury is required to determine probable cause in a malicious prosecution context "where reasonable minds could differ" as to its existence. *Roberts*, 842 S.W.2d at 249. In *Roberts*, the Tennessee Supreme Court reviewed a lower court's award of summary judgment of the plaintiff's claim of malicious prosecution in favor of his employer Federal Express. *Id.* at 246. Federal Express had caused the plaintiff's arrest warrant for grand larceny after he allegedly sought to remove various small items from the shipping warehouse where he worked. *Id.* at 247. *Roberts* ultimately reversed the district court's entry of summary judgment in favor of Federal Express because the court concluded "reasonable minds could differ as to whether probable cause existed for bringing charges against [the][p]laintiff." *Id.* at 249.

Although *Roberts* did not provide an explanation for its holding, it is apparent from the opinion's extended recitation of the facts that the court found it quite possible that the plaintiff's "theft" was unintentional. *See id.* at 247. In particular, the court called attention to the plaintiff's "exemplary job record" with the company over nine years as well as his demonstrated honesty in the workplace, including an instance where he turned in a box of 13 diamond rings that spilled out of a package. *Id.* The court also noted that the plaintiff had helped Federal Express uncover employee theft on prior occasions. *Id.*

With respect to the alleged theft, the court indicated that the plaintiff was very drowsy the day the items were discovered in his jacket pocket because he was taking Valium for severe back pain. *Id.* Furthermore, the court mentioned that the plaintiff, without prompting, had told a co-worker that he had spotted the items lying around on the warehouse floor and that he intended to turn them in, a revelation which a prospective thief is unlikely to make. *See id.* Finally, the court mentioned that the plaintiff was discovered with the items in his jacket by an electronic screening device even though he was well aware of other exits in the warehouse that did not have such a device—another sign that the plaintiff was not attempting to steal from the workplace. *Id.* In light of these circumstances, *Roberts* concluded that "reasonable minds could differ as to whether probable cause existed for bringing charges against [the] [p]laintiff." *Id.* at 249.

None of the sort of exculpatory facts found in abundance in *Roberts* are present in this case. Plaintiff has not cited to any evidence that would have undermined Discover's case for probable cause had it initiated Mrs. MacDermid's prosecution. The overwhelming evidence, as explained *supra*, would have led an "ordinarily prudent person to *believe*," even if not conclude with absolute certainty, that Mrs. MacDermid was guilty of unlawful credit card possession and use. *Id.* at 248 (emphasis added). Therefore, we find that reasonable minds could not differ as to the existence of probable cause such that a jury determination was required under *Roberts*.

D. Relevance of Subjective Belief

Finally, Plaintiff maintains Discover cannot argue Mrs. MacDermid was culpable under Tennessee criminal law because he claims Discover had a subjective belief that she had not actually committed a criminal offense when it threatened her with prosecution. During oral argument, Plaintiff's counsel asserted the separate, but related, proposition that Discover's conduct was outrageous because it lacked a good faith belief that Mrs. MacDermid had committed a crime. In support of these arguments, Plaintiff calls attention to Ms. Gilmore's admission that the Giles County District Attorney's office had informed her that Mrs. MacDermid's conduct did not constitute fraud. ROA 731. Discover dismisses the significance of this detail by pointing out that Ms. Gilmore further testified that she made no further threats of criminal prosecution against

Mrs. MacDermid after she had spoken with the District Attorney's office. ROA 732.

The issue of whether Discover subjectively believed that Mrs. MacDermid's actions were criminal is ultimately immaterial to the outcome of this appeal. Because we sit in diversity, we must apply Tennessee law. *See Uhl*, 512 F.3d at 302. As noted above, the evaluation of evidence for probable cause is an objective analysis which occurs through the perspective of the "ordinarily prudent person." *See Roberts*, 842 S.W.2d at 248. Given that the existence of probable cause defeats a claim of malicious prosecution in Tennessee even when the prosecution was made with malice, *see id.* at 247-48, Ms. Gilmore's state of mind does not raise a factual question whose resolution warrants reversal of summary judgment.

E. Conclusion

Analysis of the facts in light of the standard of review on summary judgment demonstrates that probable cause clearly existed to prosecute Mrs. MacDermid under Tenn.Code Ann. § 39-14-118(a) and (b)(4). Accordingly, Discover's legitimate threats of criminal prosecution against her during debt collection failed to constitute outrageous conduct as a matter of law. Therefore, the district court properly denied Plaintiff's Motion to Alter or Amend its prior order granting summary judgment to Discover on the intentional infliction of emotional distress claim made in Plaintiff's capacity as Administrator of Mrs. MacDermid's Estate.

To the extent Plaintiff offers other arguments not expressly addressed by this opinion, we find them without merit.

IV.

Accordingly, for the reasons stated above, we **AFFIRM** the district court's decision to deny Plaintiff's Motion to Alter or Amend.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION FILED MAY 1, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CASE NO. 1:03-0111
JUDGE KNOWLES

DONALD MacDERMID, individually and as Administrator of the Estate of NINA KAY MacDERMID,

Plaintiff,

vs.

DISCOVER FINANCIAL SERVICES, d/b/a DISCOVER CHARGECARD,

Defendant.

MEMORANDUM OPINION

This matter is before the Court upon Defendant's "Motion to Reconsider." Docket No. 131. The Motion is accompanied by the Affidavit of Valerie Kokoszka, which references three attached Exhibits. Docket No. 131-2. The Motion seeks reconsideration of part of the Court's Order of April 3, 2008 (Docket No. 104), which denied in part Defendant's Motion for Summary Judgment (Docket No. 84).

Plaintiff has filed a Response to the instant Motion. Docket No. 135. That Response raises two arguments. First, Plaintiff argues that "no basis exists for the Court's further consideration of the issues raised in the Motion." *Id.*, p. 1. Plaintiff, however, offers no explanation to support this statement. Second, Plaintiff responds that the Federal Rules of Civil Procedure do not recognize "Motions to Reconsider," and that the instant Motion is essentially an attempt to supplement, with additional factual considerations, Defendant's previously-denied Motion for Summary Judgment. Plaintiff notes that the instant Motion contains no explanation as to why these matters were not raised in the original Motion for Summary Judgment, and Plaintiff argues that the instant Motion is, effectively, an untimely Motion for Summary Judgment. Plaintiff's Response, however, does not address the merits of the matters raised in the instant Motion, the Affidavit and the Exhibits.

On August 16, 2007, the Court entered an Order setting the deadline for filing dispositive Motions on January 14, 2008. Docket No. 82. As Plaintiff argues, the instant Motion to Reconsider can be viewed as a new Motion for Summary Judgment, which is untimely. But if this evidence were presented at trial, and the Court has no reason to believe that it will not be, the Court would be compelled to grant Defendant a judgment as a matter of law under Fed. R. Civ. P. 50. The standard for granting a Motion for Summary Judgment under Fed. R. Civ. P. 56 mirrors the standard for granting a judgment as a matter of law under Rule

50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (discussing the former language of Fed. R. Civ. P. 50(a), which spoke in terms of a "directed verdict").

Plaintiff cites Fed. R. Civ. P. 59, arguing that Motions to Alter or Amend "may be filed where a movant can offer some basis for modification of an Order, based upon clerical or legal errors." Docket No. 135, p. 1. Rule 59(e) pertains to Motions to Alter or Amend a Judgment. A judgment, however, is defined to include only "a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). The Court's Order granting in part and denying in part Defendant's Motion for Summary Judgment is not a "judgment," and Rule 59(e) is inapplicable. Moreover, Rule 54(b) provides in relevant part that:

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liability of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Thus, it is appropriate for the Court to address the matters raised by Defendant.

In the instant Motion, Defendant argues that decedent Nina Kay MacDermid's conduct was criminal and, therefore, Defendant cannot be liable for outrageous conduct in threatening to bring criminal

proceedings against her. Defendant previously made this argument in its initial Motion for Summary Judgment (*See* Docket No. 12, p. 13-14), before the Sixth Circuit (*See* Docket No. 103, p. 18), and in its latest Motion for Summary Judgment (Docket No. 85, p. 19-20). In its latest Motion for Summary Judgment, Defendant argued that Ms. MacDermid had violated T.C.A. § 39-16-303, which provides in part that "A person commits the offense of using a false identification who, for the purpose of obtaining goods, services or privileges to which such person is not otherwise entitled or eligible, uses a false identification." T.C.A. § 39-16-303(a). In ruling on this argument, this Court essentially stated that Defendant had cited this statute and made the same argument in its Brief before the Sixth Circuit, and that, while the Sixth Circuit did not specifically address that statute in its Opinion, the Court would have to conclude that the Sixth Circuit was aware of Defendant's argument on this point and rejected it. Docket No. 103, p. 18.

In its Reply concerning the latest Motion for Summary Judgment, Defendant also argued that Ms. MacDermid had violated T.C.A. § 39-14-118(b)(4), which provides as follows:

> (b) A person commits the crime of fraudulent use of a credit or debit card who uses, or allows to be used, a credit or debit card or information from such card, for the purpose of obtaining property, credit, services or anything else of value with knowledge that:
>
> . . .

> (4) For any other reason the use of the card is unauthorized by either the issuer or the person to whom the credit or debit card is issued.

Docket No. 98, p. 7-8.

In addressing this argument, the Court stated as follows:

> As discussed above, there is a genuine issue as to material fact concerning whether the credit cards were "joint." If the credit card was issued to both Mr. and Mrs. MacDermid, it is not clear that "the use of the card [was] unauthorized by either the issuer or the person to whom the credit . . . card [was] issued."

Docket No. 103, p. 22.

Attached as Exhibits to the Affidavit of Valerie Kokoszka are copies of the three internet applications submitted by Ms. MacDermid. Docket No. 131-2. Each of the applications lists Donald MacDermid as the "Primary Applicant." While each of the applications contains a section headed "Secondary Applicant," none of these sections was completed. Instead, each of the three applications lists Ms. MacDermid only as an "Authorized Buyer." There is no dispute that these three applications were completed by Ms. MacDermid. As the Affidavit of Valerie Kokoszka states, "all three accounts

were established solely as individual accounts for Donald MacDermid, not joint accounts." Docket No. 131-2, p. 2.

Defendant has, therefore, established as an undisputed fact that the credit card accounts were not joint accounts. The undisputed facts further show that Ms. MacDermid used one or more of the credit cards with the knowledge that the use of the card was unauthorized by the person to whom the card was issued, Mr. MacDermid, in apparent violation of T.C.A. § 39-14-118(b)(4).[1]

In the instant Motion, Defendant also cites T.C.A. § 39-14-118(a), which provides, "A person commits the crime of illegal possession of a credit or debit card who, knowing the person does not have the consent of the owner . . . takes, exercises control over or otherwise uses that card or information from that card." It is undisputed that Ms. MacDermid used a credit card knowing that she did not have the consent of the owner, Mr. MacDermid.

Finally, in the instant Motion, Defendant cites T.C.A. § 39-14-150, which provides in relevant part:

> (b) A person commits the offense of identity theft who knowingly obtains, possesses, buys, or uses, the personal identifying information of another:

---

1. It is undisputed that Ms. MacDermid concealed the existence of and her use of these credit cards from Mr. MacDermid *See* Docket No 69, p. 5.

Appendix B

(1) With the intent to commit any unlawful act including, but not limited to, obtaining or attempting to obtain credit, goods, services or medical information in the name of such other person; and

(2) (A) Without the consent of such other person; or

(B) Without the lawful authority to obtain, possess, buy or use that identifying information.

. . .

(e) As used in this section, "personal identifying information" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including:

(1) Name, social security number, date of birth, official state of government issued driver licenses or identification number, alien registration number, passport number, employer or taxpayer identification number . . . .

It is undisputed that Ms. MacDermid used Mr. MacDermid's name, social security number, and date of birth on the applications in obtaining or attempting to obtain credit in Mr. MacDermid's name without the consent of Mr. MacDermid.

Under these circumstances, Defendant's threats to criminally prosecute Ms. MacDermid cannot, as a matter of law, constitute outrageous conduct.

For the foregoing reasons, Defendant's "Motion to Reconsider" will be GRANTED, and the Court will reconsider its previous Order (Docket No. 104). The Court concludes that there is no genuine issue as to any material fact and that Defendant is entitled to a judgment as a matter of law with regard to Plaintiff's claims as Administrator of the Estate of Nina Kay MacDermid.

While the instant Motion to Reconsider argues that the Court should enter an Order granting summary judgment as to all Plaintiff's remaining claims, the Motion makes no argument with regard to Plaintiff's claims for outrageous conduct in his individual capacity, which are based upon Defendant's threats of criminal prosecution directed to him. *See* Docket No. 103, p.22-23. Thus, as discussed in the Court's previous Memorandum Opinion, Defendant is not entitled to summary judgment with regard to these claims. *Id.*

An appropriate Order will be entered.

s/ E. Clifton Knowles
E. Clifton Knowles
United States Magistrate Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CASE NO. 1:03-0111
JUDGE KNOWLES

DONALD MacDERMID, individually and as Administrator of the Estate of NINA KAY MacDERMID,

Plaintiff,

vs.

DISCOVER FINANCIAL SERVICES, d/b/a DISCOVER CHARGECARD,

Defendant.

ORDER

For the reasons stated in the Court's Memorandum Opinion, entered contemporaneously herewith, Defendant's "Motion to Reconsider" (Docket No. 131) is GRANTED. Having reconsidered its previous Order (Docket No. 104) in light of the Motion and accompanying materials, the Court concludes that there is no genuine issue as to any material fact and that Defendant is entitled to a judgment as a matter of law with regard to Plaintiff's claims as Administrator of the Estate of Nina Kay MacDermid. Therefore, Plaintiff's claims as Administrator of the Estate of Nina Kay MacDermid are DISMISSED WITH PREJUDICE.

Appendix B

To the extent that Defendant seeks reconsideration of the Court's Order denying Defendant summary judgment on Mr. MacDermid's individual claims, that Motion is DENIED.

IT IS SO ORDERED.

s/ E. Clifton Knowles
E. Clifton Knowles
United States Magistrate Judge

APPENDIX C -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 29, 2007

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 06-5792.
Argued: April 20, 2007.
Decided and Filed: May 29, 2007.

DONALD H. MACDERMID, Individually and as Administrator of the Estate of Nina Kay MacDermid,

Plaintiff-Appellant,

v.

DISCOVER FINANCIAL SERVICES d/b/a Discover Charge Card,

Defendant-Appellee.

Before: MERRITT and MARTIN, Circuit Judges; FORESTER, District Judge.*

* The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Appendix C

OPINION

BOYCE F. MARTIN, JR., Circuit Judge.

Donald MacDermid appeals from the magistrate judge's dismissal of his claims on the pleadings and at summary judgment. *See MacDermid v. Discover Fin. Servs.*, No. 1:03-0111, 2006 WL 1454743 (M.D.Tenn. May 12, 2006). Mr. MacDermid alleges that his wife, who suffered from a severe form of bipolar disorder, committed suicide as a consequence of Discover Financial's harassing of the couple over $15,000 worth of purchases that she had made, but not paid for, on a Discover credit card. For the reasons discussed below, we **AFFIRM in part** and **REVERSE in part.**

I

The facts of this case were aptly set forth by the magistrate judge in his summary judgment order:

In August 2002, Nina Kay MacDermid, using the "family computer" located upstairs in the home which she shared with her husband, Donald H. MacDermid, went on-line to the Discover Card web site and filled out an application requesting a credit card. She provided her personal information as well as personal information of her husband, like his Social Security number. She submitted the application for her husband as the primary card holder and herself as an authorized buyer.

Appendix C

Subsequently, Mrs. MacDermid went on-line again in August and then in September and applied for two more Discover cards in her husband's name, providing Discover with his personal information and requesting that the cards be issued with him as the primary card holder and her as an authorized buyer. In order to be able to receive these credit cards from Discover without her husband's knowledge, she obtained a post office box in Linville, Tennessee. These cards were subsequently issued to her and she was able to intercept them and use them without her husband's knowledge.

Mrs. MacDermid made numerous purchases using her Discover cards. These purchases ranged from every day necessities such as gas and computer products to exotic cats.

Unbeknownst to Discover, Mrs. MacDermid had a long history of mental illness. She had been diagnosed in the early 1990s as having *bipolar disease* and being manic depressive. She underwent drug and alcohol counseling at Parthenon Pavilion (a Nashville psychiatric hospital) in the early 1990s. According to her husband, she continued to struggle with drug and alcohol problems into their marriage.

Mrs. MacDermid also had a history of manic spending sprees. She had previously run up credit card debt requiring her to file personal bankruptcy in the late 1990s. After her discharge from bankruptcy, her husband, who had helped her by paying off some of her debts, forbade her from having any credit cards.

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After her bankruptcy, Mrs. MacDermid was on a "cash only basis." She was not working, and her husband would provide her with money for purchases which he felt were warranted. Hence, she surreptitiously obtained not only these three Discover cards, but also cards from American Express, Household Bank, and Chase, among others. According to Mr. MacDermid, his wife obtained all of these credit cards essentially the same way that she did the Discover cards (i.e., without his knowledge, and in his name, using his personal information).

On February 14, 2003, Mr. MacDermid intercepted checks which had been sent to his residence by Discover. Mr. MacDermid confronted his wife about these checks and she denied having any knowledge of them. He admits that he was angry. In his notes concerning the incident, Mr. MacDermid states that he had a "stressful confrontation" with his wife. He explained in his deposition that, "It was, you know . . . to my knowledge, I confronted her with it and that would be stressful to her, very stressful, under the circumstances."

Two days later, Mr. MacDermid found his wife in bed "in a near death condition." Mrs. MacDermid was admitted to Maury Regional Hospital on February 16, 2003, where she remained for five days until her discharge on February 21, 2003. The medical records list her discharge diagnosis as "acute narcotic overdose" and "*anoxic brain injury.*" The records also indicate that she had "battled *bipolar disease* for about a decade."

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Shortly after his wife was admitted to the hospital, Mr. MacDermid "went through [his wife's] stuff" when he "got back home from the hospital." He found a number of credit cards and statements showing that she was delinquent on a number of different credit cards. After Mr. MacDermid found these credit cards he "cancelled them." He "called each one and cancelled them and wrote letters to each one."

On March 1, 2003, Mr. MacDermid wrote a letter to Discover Financial Services. . . . This letter states in pertinent part as follows:

> This is to confirm that the credit cards noted above, or any other credit instrument in my name to you, is not and has never been authorized nor requested by me. I was unaware of the cards, or you listing me as cardholder. I have not used them. I have not benefited from it in any way, to the best of my knowledge.

In this letter, Mr. MacDermid also states that "I have never signed any request, authorization to open, or authorization for anyone else to obtain or use your cards." Mr. MacDermid does not dispute the fact that his wife obtained these Discover cards and purchased goods with them. He also admits that she was ultimately responsible for paying them.

After Mrs. MacDermid was released from the hospital, she was under the care and supervision of

psychiatrist Dr. John Koomen. On Wednesday, June 11, 2003, two days before she committed suicide, she visited with Dr. Koomen. Sometime around that visit, she purchased a handgun. On June 13, 2003, Mrs. MacDermid used this newly-purchased handgun to commit suicide.

Mrs. MacDermid hand wrote a note for her husband, which Mr. MacDermid found after she had killed herself. This note, which is undated, states as follows:

> Dear Don,
>
> The pressure just got the best of me. I got to where I could not even function any more. I am so sorry I let the house go, and everything, please forgive me. I really do love you, but I just cannot take this kind of pressure, and humiliation any longer. I am so sorry for all the worry I have caused you Don, I just wish we were back at the old church once again. I really do love you. I am so sorry to do this to us, but I am not me any more Don. I do not want to take your money either. We should have spent more time together, some vacations, and not all work. I stayed here by myself way too much. I feel like I am having a nervous breakdown. I keep the shakes all the time, and numbness all through my body and paranoid, that is no way to live. I will always love you, your wife Kay.

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Mr. MacDermid testified that he was shocked and surprised by his wife's suicide. He testified that she did not act any differently in the weeks leading up to her suicide. Mr. MacDermid did notice that his wife was "perhaps a little more relaxed." She did not have any conversation with him that, in hindsight, he thinks was out of character, or that indicated she was contemplating suicide or trying to say goodbye. Mr. MacDermid plainly admitted that "I didn't see it coming. I'll put it that way, in my own perspective." Mr. MacDermid did not think that her friends or family foresaw that she was going to commit suicide. He testified that certainly if his wife's mother thought that she would commit suicide, then her mother would have done something about it.

Mr. MacDermid was not specifically warned by Dr. Koomen, his wife's treating psychiatrist, that suicide was an imminent threat. Dr. Koomen did not tell Mr. MacDermid to take any specific precautionary measures to prevent his wife from taking her own life. Mr. MacDermid had a number of guns, including handguns, in the house, all of which were fully accessible to his wife. Dr. Koomen did not suggest to Mr. MacDermid that he should not have guns in the house.

In addition, Mrs. MacDermid had full access to all of her medication and was administering all of her medication herself, even though she had been hospitalized in February for an "acute narcotic overdose." Mr. MacDermid stated that he "wasn't really looking for a suicide." Mr. MacDermid further explained,

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"Nobody saw it coming to the extent that they would, you know, overtly do something about it, which would be saying, you know, Hey, you're in danger. I didn't see it. Nobody else did."

The last contact that Mr. MacDermid had with anyone from Discover was "probably a phone call . . . at least a week or two weeks prior to [the] suicide." Although he was not positive, Mr. MacDermid thought that the last contact that either he or his wife had with Discover was some time in May 2003.

Plaintiff has submitted the Affidavit of Dr. Koomen, which states in pertinent part as follows:

> As my attached hand-written notes indicate, Ms. MacDermid was primarily concerned by the recent allegation by a credit card creditor that she had been guilty of "credit card fraud." That reference appears on pages one (1) and two (2) of the "Initial Psychiatric Assessment" conducted by me at the commencement of my evaluation and treatment of Ms. MacDermid [which is dated 3/6/03]. During my initial interviews with Ms. MacDermid and in the ensuing weeks through April and May of 2003, Ms. MacDermid voiced apprehension over the allegations against her by the credit card company which was accusing her of credit card fraud. She was terrified at the prospect of going to jail and causing further

embarrassment to her family, particularly her husband. While I did not discuss the specifics of the threats of jail with Ms. MacDermid, I note that she was preoccupied with the allegations of credit card fraud, and that it appeared to be the primary stressor which contributed to the deterioration of her emotional and mental condition in April and May of 2003. Subsequent to her selfinflicted gunshot death on June 13, 2003, it was reported to me by Mr. Don MacDermid, her husband, that she had just been threatened with immediate jailing by credit representatives of Discover Card, and that her fear and embarrassment related to the threat of incarceration appeared to be paramount in the voiced fears which led to her suicide.

[. . .]

Based upon my review of the psychiatric records of Nina Kay MacDermid, my personal involvement in her psychiatric care from March of 2003 through the date of her death in June 2003, and upon the history of the threat of immediate jailing by collection agents for Discover Card, it is my opinion that it is more probable than not, within reasonable medical certainty, that the significant precipitating factor in the causation of the death of Nina Kay

> MacDermid were the threats of criminal fraud prosecution and incarceration by the collection representatives. In the absence of the threats of arrest and incarceration, I believe that it is more probable than not, within reasonable medical certainty, that Ms. MacDermid could have maintained her rational thought processes, and the condition could have been stabilized, as it had many times in the past, through continued counseling and appropriate medication. My office provided appropriate care, supervision, and treatment to Nina Kay MacDermid throughout our relationship with Ms. MacDermid. All care provided by my office, and under my supervision, was consistent with the local standard of care in the Columbia, Maury County, Tennessee medical community.

MacDermid, 2006 WL 1454743, at *2-*5.

On October 9, 2003, Mr. MacDermid filed the instant action in federal court, alleging: (1) wrongful death, i.e., negligence on the part of Discover in causing Ms. MacDermid's suicide; intentional infliction of emotional distress, based on Discover's actions in attempting to collect the debt purportedly owed it; (3) violation of the Tennessee Consumer Protection Act, Tenn.Code Ann. § 47-18-101 *et seq.*; (4) fraud; (5) civil extortion; (6) violation of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*; (7) credit

defamation/libel; and (8) violation of the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* The parties consented to have all proceedings conducted by a magistrate judge.

The above claims were largely dismissed by the magistrate judge upon Discover's motion to dismiss on the pleadings, but two claims were allowed to proceed to discovery: wrongful death and credit defamation. The magistrate judge subsequently granted Discover's motion for summary judgment on these two remaining claims, thus disposing of the case. Mr. MacDermid now appeals as follows: first, the 12(b)(6) dismissal in favor of Discover as to (a) intentional infliction of emotional distress, (b) violation of the Tennessee Consumer Protection Act, (c) violation of the federal Fair Debt Collection Practices Act, and (d) violation of the federal Truth in Lending Act; and second, the summary judgment ruling in favor of Discover on his wrongful death claim.

II

This Court reviews *de novo* both the 12(b)(6) and summary judgment rulings of the magistrate judge. *Adika v. Smith*, 466 F.3d 503, 505 (6th Cir.2006); *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir.2005).

In reviewing a 12(b)(6) motion to dismiss, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which

would entitle him to relief." *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir.2006) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). This Court "must accept all facts in the complaint as true and construe the complaint liberally in favor of the plaintiff." *Adika*, 466 F.3d at 505.

In reviewing a summary judgment motion, "the facts and any inferences that can be drawn from those facts[ ] must be viewed in the light most favorable to the non-moving party." *Bennett*, 410 F.3d at 817 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Fed.R.Civ.P. 56(c)).

A. Claims Dismissed on the Pleadings

(i) Intentional Infliction of Emotional Distress

Tennessee state courts recognize the tort of intentional infliction of emotional distress, although they typically refer to this tort as "outrageous conduct." *See Bain v. Wells*, 936 S.W.2d 618, 622 n. 3 (Tenn.1997) ("Intentional infliction of emotional distress and outrageous conduct are not two separate torts, but are simply different names for the same cause of action."). Regardless of chosen moniker, however, the elements

of the tort are clear: "(1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury." *Id.*; *see also Medlin v. Allied Inv. Co.*, 217 Tenn. 469, 398 S.W.2d 270, 274 (1966). Both parties agree that the second element–i.e., whether or not Discover's conduct was "so outrageous"–is primarily at issue in the instant case.

Mr. MacDermid argues that Discover's conduct, as depicted in his complaint, was at least sufficient to state a claim for outrageous conduct under Tennessee law. In particular, MacDermid asserts that because Discover was on notice of his wife's "fragile mental status," the company crossed the line between "excessive (but permissible) pressure tactics" and "outrageous conduct which is intended to cause harm that is disproportionate to the creditor's right to seek payment." Discover counters by noting that Tennessee courts "have been very reluctant to find that a creditor's objectionable collection methods constitute outrageous conduct." This is especially true, argues Discover, in situations where, as here, the creditor is *actually owed* the debt in question, and where the debtor/decedent has *actually committed* credit card fraud by "unlawfully submitting" her husband's personal information over the internet to obtain the credit cards. The magistrate judge sided with Discover.

We cannot agree with this dismissal of the outrageous conduct claim at the 12(b)(6) stage. While

Discover is correct that it was actually owed the debt in question, we disagree with its contention that Mrs. MacDermid was necessarily criminally liable for credit card fraud. As such, Mr. MacDermid has at least stated a claim for outrageous conduct based on Discover's threats of criminal prosecution for failure to pay a purely civil debt. Mr. MacDermid's amended complaint states as follows:

> The conduct, threats and statements described herein as having been made by the Defendant were persistent and increasing in frequency throughout the spring of 2003 and were made to both Plaintiff and decedent. As a direct and proximate result of the Defendant's conduct, threats and statements as described herein, the decedent required psychiatric hospitalization only a few weeks before her untimely death on June 13, 2003. The Plaintiff will show that during telephone conversations with the Defendant's collection agents throughout the Spring of 2003, and culminating in the time around the decedent's death, the Plaintiff repeatedly warned the Defendant's agents of the very severely debilitated mental and physical condition of the decedent and that the condition was caused by those collection efforts, specifically the implicit and, at times, explicit threat that decedent would be jailed if the subject debt was not quickly paid. During several of the above-referenced telephone calls, but at least

> several weeks or months prior to the decedent's death, the Plaintiff warned Defendant's agents that their continued collection efforts, including threats of criminal prosecution, would lead to the decedent's death or would otherwise "kill" her because of the decedent's debilitated mental and physical condition.

MacDermid also related in his complaint a telephone conversation that he had on April 9, 2003 with Adonica Gilmore, a Discover employee. Because MacDermid had taped the conversation, he was able to describe it in some detail in his complaint:

- that she [Adonica Gilmore] had checked with the local District Attorney's office and had spoken with a lady named "Harriott" who had told her that, under the facts described above, Mr. MacDermid is legally liable for his wife's charge card; and

- that she had filed a report with the Giles County Sheriff's office; and

- that Harriott Barkly of the Giles County District Attorney's office, advised her that because the MacDermids were married, and because Mr. MacDermid was aware of his wife's problem, he "should keep a better eye on her" and should "keep her away from the internet"; and

- [that Adonica Gilmore stated about Mrs. MacDermid,] ***"I don't think you want her going . . . well you know"***; and

- that there was no need for him to talk to a lawyer, because, even though there was no signature, and it was procured on the Internet, Mrs. MacDermid's application is binding on Mr. MacDermid, and he is definitely liable; and

- that [Adonica Gilmore stated], if the matter could not be resolved, ***"I'll just call Harriott" . . . and have the authorities "take a little trip out to your house."***

(Emphasis added.)

The Tennessee Supreme Court has stated that with respect to creditor-debtor interactions, "[t]he general rule is that a creditor has a right to urge payment of a *just debt*, and to threaten to resort to *proper legal procedure* to enforce the obligation. Hence, the creditor is not liable for a mental or emotional disturbance, or for a bodily injury or illness, as a result of his mere attempt, by reasonable means, to collect." *Moorhead v. J.C. Penney Co.*, 555 S.W.2d 713, 718 (Tenn.1977) (emphasis added). Nevertheless, "improper methods used to collect a debt may be the basis for the maintenance of an action for a mental or emotional disturbance produced thereby, or for a bodily injury or illness resulting from such mental or emotional

disturbance, especially where the circumstances attending the effort to collect the claim are such as to invoke the general rule that one who wilfully or intentionally causes great emotional distress, *without justification*, is liable for such injuries." *Id.* (emphasis added).

MacDermid leans heavily on *Moorhead* to argue that his claim should have survived dismissal. In that case, a married couple maintained a charge account with defendant J.C. Penney Company. 555 S.W.2d at 714. Upon returning a piece of merchandise, the couple was assured that they would receive a credit in the sum of $16.78, and yet their next monthly statement included a charge, not a credit, for $16.78. *Id.* The couple repeatedly called J.C. Penney to point out the error, and yet they continued to receive, on an almost daily basis, threatening letters from Penney and from Penney's collection agency demanding payment. *Id.* at 714-15. In all, the couple received forty-two threatening letters and numerous abusive phone calls, some threatening lawsuit and others falsely impugning the husband's financial reputation. *Id.* at 715. In finding that J.C. Penney's conduct constituted outrageous conduct, the Tennessee Supreme Court found particularly galling the fact that the letters and phone calls had "continued long after defendant had acknowledged that its accounts were in error and that plaintiffs owed it nothing." *Id.* at 717. The court also "regarded as significant" several other factors in the case: (1) the long duration of J.C. Penney's conduct, which was alleged to have persisted for over one year; (2) the volume of threatening

letters; and (3) the threats to "deliberately injure the plaintiff's credit reputation" and "jeopardize their job security." *Id.* Much like in *Moorhead*, MacDermid argues that in this case "it is difficult to conceive of any justification for a creditor's threat to pursue the jailing of a mentally ill person if either she or her husband failed to pay the debt." Appellant's Br. at 22.

The problem with MacDermid's reliance on *Moorhead*, however, is that there the creditor was clearly without justification in pursuing collection of the debt. In fact, there was no debt at all, but rather a credit. In the instant case, in contrast, even Mr. MacDermid admits that Discover had a right–at least initially–to pursue payment of the charges that Mrs. MacDermid had accrued. He simply alleges that they went too far in their efforts, by threatening criminal penalties for a purely civil debt, by threatening in the manner they did even when put on notice of Mrs. MacDermid's condition, and by holding him jointly liable for the debts even though he was wholly unaware of what his wife had done. This places the instant case more squarely in the realm of cases in which a defendant creditor or collection agency was either justified in collecting the debt or at least appeared to have a reasonable excuse–such as a delay in the mails or a computer error in bookkeeping-for why it continued to pursue collection of the debt. *See, e.g., Potts v. First Peoples Bank of Jefferson County*, No. 03A01-9303-CV-00116, 1993 WL 276858 (Tenn. Ct.App. July 22, 1993) (unreported); *Patterson v. Prof'l Adjustment Serv., Inc.*, 544 S.W.2d 617, 620-21 (Tenn.Ct.App.1976) (dismissing plaintiff's outrageous

complaint for failure to state a claim even though defendant attempted to collect a small balance "through harassment, coercion, and intimidation"); *Medlin*, 398 S.W.2d at 272 (dismissing plaintiff's outrageous conduct complaint even though mortgage lender mistakenly sent two notices of foreclosure and was "abusive and insulting" to plaintiffs over the telephone).

Although *Moorhead* does not provide MacDermid with the firm footing he might have hoped, his claim has another, stronger leg to stand on. Namely, because his complaint alleges false threats by Discover employees of *criminal* prosecution–i.e., words to the effect of, "if you don't pay up I'll have the district attorney take a little trip to your house"–his case may be distinguished from most of the Tennessee authorities regarding creditors' attempts to collect a debt, justified or unjustified. Discover maintains that criminal prosecution of Mrs. MacDermid was warranted because "in his Complaint, Plaintiff admits that Decedent committed credit card fraud by unlawfully submitting Plaintiff's personal information to obtain the credit cards from Discover via the internet." Appellee's Br. at 22. Yet a wife's submission of her husband's name and social security number to obtain a credit card (which appears to have been all that was required in this instance), even if she does so without his permission, does not necessarily constitute fraud. It would seem that something beyond the pleadings is required for Discover to show that Mrs. MacDermid had in fact committed fraud against the company–for example, via a copy of the on-line application and an explanation of the material

misrepresentations contained therein. Alternatively, if Discover is somehow alleging that Mrs. MacDermid committed fraud on her *husband* as opposed to the company, then we do not see how Discover could reasonably suggest to Mr. MacDermid that criminal fraud charges would be pursued against Mrs. MacDermid on his behalf, unless of course he had consented to such action.[1]

To be sure, Tennessee's outrageous conduct standard, as in many states, is a formidable one. "To qualify as outrageous, conduct must be 'so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly [i]ntolerable in a civilized community.' " *Doe 1 v. Roman Catholic Diocese of*

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1. At oral argument, counsel for Mr. MacDermid vociferously denied having *admitted* that Mrs. MacDermid's application for a credit card over the internet, using her husband as co-obligor, was a criminal offense. We side with the Appellant on this issue, and find Discover's suggestion-both in its brief and at oral argument–that Mrs. MacDermid was *per se* criminally liable for credit card fraud to be not only premature given the 12(b)(6) stage of the proceedings, but also quite likely erroneous. It is our understanding from the limited record on this point that at most, Mr. MacDermid called Discover when he initially found out about what his wife had done, at which point he was asked if he wanted to pursue a fraud allegation (e.g., by filling out the proper affidavit), and he then *specifically declined* to pursue such action. *See* Joint App'x at 451-53 (containing copies of the affidavit that Discover sent to Mr. MacDermid, but that he never filled out at all, let alone signed).

Nashville, 154 S.W.3d 22, 39 (Tenn.2005) (quoting *Medlin*, 398 S.W.2d at 274). "[T]he outrageousness requirement is an 'exacting standard' which provides the primary 'safeguard' against fraudulent and trivial claims." *Id.* (quoting *Miller v. Willbanks*, 8 S.W.3d 607, 614 (Tenn.1999)). Nevertheless, given the allegations in Mr. MacDermid's complaint, and given the fact that we must construe them liberally and in a light favorable to the plaintiff, we reverse the magistrate judge's 12(b)(6) dismissal of MacDermid's outrageous conduct claims and remand for further proceedings.

(ii) Violation of the Tennessee Consumer Protection Act

The Tennessee Consumer Protection Act ("TCPA"), Tenn.Code Ann. § 47-18-101 *et seq.*, serves in part "[t]o protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within [Tennessee]." *Messer Griesheim Indus. v. Cryotech of Kingsport, Inc.*, 45 S.W.3d 588, 609 (Tenn.Ct.App.2001) (quoting Tenn.Code Ann. § 47-18-102(2)). In his complaint, Mr. MacDermid asserted that Discover's "practice of soliciting, and processing, purported binding credit applications by the Internet, with no mechanism for obtaining a signature of all purported obligors," causes "confusion and deception to the consumer" and is an "inherently deceptive practice" in violation of Tennessee law. In its motion to dismiss, Discover countered that its application method is expressly permitted by the

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Tennessee Uniform Electronic Transactions Act, Tenn.Code Ann. § 47-10-101 *et seq.* , and the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq.* Because the TCPA does not apply to "[a]cts or transactions required or specifically authorized under the laws administered by, or rules and regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States," Tenn.Code Ann. § 47-18-111(a)(1), Discover reasoned that it should not apply to a case where, as here, the company's internet application process expressly complied with both state and federal law.

On appeal, Mr. MacDermid does little to rebut Discover's argument as to this claim. Indeed, nothing on the face of his complaint suggests that Discover's internet application process ran afoul of the state and federal laws governing such transactions. His conclusory allegation that the application process is "inherently deceptive" is not enough to survive 12(b)(6) dismissal. *See Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir.2005) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."). MacDermid also appears to insert in his brief a different allegation from that appearing in his complaint-namely, that it was not merely Discover's *deceptive* conduct, but also its *threatening* conduct, that violated the TCPA. Regardless of the merits of this new argument, however, it comes too late. MacDermid cannot at this stage in the litigation add new allegations to his complaint,

especially when he has not properly sought leave to amend the complaint as to this particular allegation. *See, e.g., Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 328 (6th Cir.2006) ("The appropriate method for adding new factual allegations to a complaint is not via an appellate brief, but by filing an amended complaint.").

We therefore affirm magistrate judge's 12(b)(6) dismissal of MacDermid's TCPA claim.

(iii) Violation of the Federal Truth in Lending Act

The federal Truth in Lending Act ("TILA") aims to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). MacDermid alleges in his complaint that Discover's "efforts to impose civil liability" on him, as well as its "statement[s] to merchants and other persons affirming the validity of the debt," violated TILA because he "never signed, or reviewed, any application which contained the federally mandated disclosures." The magistrate judge quickly dismissed this TILA claim because MacDermid "aver[red] that he did not apply for, accept, authorize, or utilize the credit card." Mag. J. Op., 9/20/2004, at 23. Accordingly, the judge reasoned, he was not properly a "consumer" under TILA–and thus unable to avail himself of any private cause of action under TILA–because he was not party to the credit transaction.

MacDermid now maintains that because he was treated by Discover as a "debtor" on the basis of his wife's credit card action, he must therefore also be a "consumer" under TILA and afforded all of its protections. Even if MacDermid is correct, however, his argument asks too much, and he provides not a single case to support it. To be sure, TILA requires credit card providers to disclose information-such as terms and conditions, fees, and annual percentage rates–to the "*person* to whom the credit is to be extended." 15 U.S.C. § 1637(a) (emphasis added). These disclosures must be made at various times: at the point of application or solicitation for the credit card, 15 U.S.C. § 1637(c); at the point of account opening, 15 U.S.C. § 1637(a); at the end-point of each billing cycle, 15 U.S.C. § 1637(b); and at the point of card renewal, 15 U.S.C. § 1637(d).

Although it appears from the record that the on-line application listed Mr. MacDermid as the primary cardholder and Mrs. MacDermid as an authorized buyer, Joint App'x at 503, the exact contours of their contractual obligations to Discover (whether individually or as a couple) remain somewhat unclear to us, at least at this stage in the proceedings. Regardless of the exact scenario, however, nothing in TILA would seem to require a credit card company to investigate the legitimacy of an *address* provided in an application, especially where the two people listed on the application are presumed–and in this case, indeed are–members of the same household. We cannot expect Discover to have known that Mrs. MacDermid had schemed, unbeknownst to her husband, to create a post-office box

to which the credit card (and disclosures) were to be sent. Mr. MacDermid certainly makes no allegation that the proper disclosures were not sent to this post-office box. He simply alleges that Discover violated TILA because he did not personally receive the proper disclosures. Unfortunately, this argument-that Discover violated TILA because it could not divine his *actual* address–finds no support in any law that we can discover.[2]

We therefore affirm the magistrate judge's 12(b)(6) dismissal of Mr. MacDermid's TILA claim.[3]

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2. This is not to deny that credit card providers' current practice of issuing cards through on-line applications may well be overly aggressive, and their efforts to screen out "risky" applicants overly lax. Indeed, given Mrs. MacDermid's poor credit history–she had recently emerged from personal bankruptcy, *see* MacDermid Aff., 2/28/2006, at 1–she would likely have been unable to be approved for a credit card without putting her husband's name on the application. While Mr. MacDermid may well be justifiably angered by the predatory practices of many credit card providers, however, his anger in this case cannot be properly addressed (or assuaged) via a Truth in Lending Act claim.

3. Discover further notes that even if MacDermid could properly state a claim against it under the TILA, this claim would be time-barred. *See also* Mag. J. Op., 9/20/2004 at 23 n. 7. The TILA provides for a one-year statute of limitations. 15 U.S.C. § 1640(e) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."). Mrs. MacDermid actually

(Cont'd)

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(iv) Violation of the Federal Fair Debt Collection Practices Act

The purpose of the Fair Debt Collection Practices Act ("FDCPA") is "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). The term "debt collector" has a particular meaning, however: it refers only to persons attempting to collect debts due "another." *See id.* § 1692(a)(6) ("The term 'debt collector' means any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."); *see also Stafford v Cross Country Bank*, 262 F.Supp.2d 776, 794

(Cont'd)

obtained the Discover credit cards in August and September of 2002. If this is the date from which the one-year clock is to start ticking, then it would appear that the TILA claims, filed on October 9, 2003, are time-barred. On the other hand, Mr. MacDermid's TILA claim is premised on the notion that he could not have been aware that he had not received the proper disclosures until such time as he found out about his wife's deception This does not appear to have occurred until February 14, 2003, when he intercepted checks sent to his residence by Discover, and after confronting to his wife began to figure out what she had done. Joint App'x at 505. And using this later date to start the limitations clock, Mr. MacDermid's claim would clearly *not* be time-barred. However, because the statute-of-limitations issue is not particularly well-developed (the magistrate judge relegated it to a footnote, Discover mentions it in an "assuming arguendo" paragraph at the end of its TILA argument section, and MacDermid says nothing about it at all) nor is it necessary in our resolution of the TILA claim, we decline to decide it.

(W.D.Ky.2003) (considering it "well-settled" that "a creditor is not a debt collector for the purposes of the FDCPA and creditors are not subject to the FDCPA when collecting their accounts").

Based on the FDCPA definition, Discover is clearly not a "debt collector"; rather, it is the very party to whom the debt is due. On appeal, Mr. MacDermid asserts that his FDCPA claim should at least be allowed to proceed to discovery so that the "exact structure and relationship" of the Discover "representatives" may be determined. This argument strikes us as logically incoherent. Even if discovery were to reveal that the persons alleged to have engaged in "outrageous conduct" in the collection of the MacDermids' debt were *not* Discover employees, but rather employees of some third-party collection company, that would not change the fact that neither Discover nor its employees are "debt collectors" under the FDCPA. MacDermid could theoretically maintain an FDCPA action against these yet unnamed third-party collectors, but any FDCPA action against Discover would still be properly dismissed. (And MacDermid should probably be careful what he wishes for: after all, if it were determined that Discover's employees were not in fact on the other end of the phone line, then most of his more colorable claims–such as wrongful death and intentional infliction of emotional distress–would not be against Discover, but against the third-party collector. MacDermid's only hope against Discover on these facts would then be on a theory of *respondeat superior* liability.)

We therefore affirm the magistrate judge's 12(b)(6) dismissal of MacDermid's FDCPA claim.

B. Claims Dismissed on Summary Judgment (Wrongful Death Claim)

Mr. MacDermid's wrongful death claim was premised on a theory of negligence.[4] In its motion for summary judgment as to this claim, Discover argued not only that it owed no duty of care to Mrs. MacDermid, but more importantly, that Mrs. MacDermid's suicide constituted an "intervening cause" serving to cut off any reasonably foreseeable link between Discover's actions and her untimely death. Discover supported its motion with excerpts and exhibits from the deposition of Mr. MacDermid, and with Mrs. MacDermid's medical records. Mr. MacDermid challenged Discover's "intervening cause" defense, relying largely on case law and the affidavit–excerpted in the facts section above–of Dr. John Koomen, Mrs. MacDermid's treating psychiatrist in the months preceding her death.[5]

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4. *See MacDermid*, 2006 WL 1454743, at *6 n. 4 ("While Plaintiff never specifically mentions 'negligence' in his Complaint, he clearly seeks to recover for the wrongful death of his wife. Because Plaintiff never avers in his Complaint that Defendant intentionally killed decedent, his wrongful death claim must be based upon a theory of negligence. Plaintiff's Response to the instant Motion for Summary Judgment . . . does not dispute the fact that this claim is based upon negligence.").

5. Interestingly, Dr. Koomen first began seeing Mrs. MacDermid on March 3, 2003, i.e., soon after the credit

(Cont'd)

Appendix C

In Tennessee, "[o]ne of the rules of law that will relieve a negligent actor from liability is the doctrine of independent intervening cause." *Rains v. Bend of the River*, 124 S.W.3d 580, 593 (Tenn.Ct.App.2003). This doctrine is "premised on the concept that the independent intervening cause breaks the chain of legal causation between the original negligent actor's conduct and the eventual injury." *Id.* And as the *Rains* court noted, foreseeability is the touchstone of the independent intervening cause inquiry, because "no person is expected to protect against harms from events that he or she cannot reasonably anticipate or foresee or which are so unlikely to occur that the risk, although recognizable, would commonly be disregarded." *Id.* This renders the inquiry one of proximate cause, which is nothing more than a fancy word by which courts establish, often through simple common sense, a "boundary of legal liability." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn.1993); *see also White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn.1998) (noting that proximate cause determinations are "based

(Cont'd)

card problems were revealed. Koomen Aff., 2/28/2006, at 1. However, nothing in the record explains why Dr. Koomen began seeing her at this time, even though she had been in continuous counseling with other doctors prior to the precipitating event. MacDermid Aff., 2/28/2006, at 1. This is not to cast doubt on Dr. Koomen's affidavit or his professional skills, and there may well be a perfectly good explanation for the change in therapists. Nevertheless, without the testimony of the prior therapists, it is difficult to get a handle on Mrs. MacDermid's "baseline" mental state.

on considerations of logic, common sense, policy, precedent and our more or less inadequately expressed ideas of what justice demands or of what is administratively possible and convenient" (internal quotations omitted)).

Tennessee courts have also "consistently recognized" that suicide properly constitutes an independent intervening cause in most wrongful death actions. *Rains*, 124 S.W.3d at 593 (collecting cases). There are three exceptions to this general rule, however: (1) where defendant's negligence causes "delirium" or "insanity" that results in self-destructive acts; (2) where defendant is the decedent's custodian, and defendant knows or has reason to know that the decedent might engage in self-destructive acts; (3) where defendant and decedent have a legally recognized "special relationship," such as a physician-patient relationship, and defendant knows or has reason to know that the decedent might engage in self-destructive acts. *Id.* at 593-94. Here, nothing on the record indicates that Discover and Mrs. MacDermid had either a "custodial" or a "special" relationship; rather, the two were engaged in nothing more than a routine business transaction. Mr. MacDermid concedes as much, and thus his arguments necessarily focus on the first exception listed above. These arguments were unavailing before the magistrate judge, who reasoned as follows:

> There is simply no medical proof in this case to show that Defendant's conduct caused a

> delirium or insanity in decedent. Dr. Koomen's Affidavit says nothing about "delirium," or "insanity." Despite Plaintiff's statement to the contrary, there is simply nothing in Dr. Koomen's Affidavit to support the proposition that Defendant's threats of prosecution and jail "caused a significant deterioration in [Plaintiff's] rational thought process." Likewise, there is nothing in Dr. Koomen's Affidavit showing that decedent was rendered "bereft of reason."

MacDermid, 2006 WL 1454743, at *7 (brackets in original). The magistrate judge further noted that "there is absolutely no expert medical proof that decedent's suicide was a reasonably foreseeable result of any act or omission of Defendant." *Id.* at *9.

The magistrate judge reached the correct result in granting summary judgment in favor of Discover. The delirium/insanity exception to the general rule in Tennessee that suicide constitutes an independent intervening cause in a wrongful death action appears to be extremely limited in application-so limited, in fact, that Mr. MacDermid is unable to cite to a single case in which this particular exception was applied in a *plaintiff*'s favor. To the contrary, all of the relevant Tennessee cases appear to cut in favor of defendants. As the Supreme Court of Tennessee has stated: "The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful

consideration have adjudged to be on one side of the line or the other." *Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217, 221 (1965) (internal citations and quotation marks omitted). Based on these illustrations, we cannot conclude that Mr. MacDermid's wrongful death action should survive summary judgment.

In *Lancaster* itself, for example, defendant Montesi was alleged to have caused the suicide of Margaret Lancaster by "dominating and controlling" her to her ultimate breaking point. *Id.* at 219. Lancaster was married to another man but was having an affair with Montesi, who allegedly inflicted on her punishment "of the most sadistic type": in particular, Montesi allegedly broke her leg, burned her with a cigarette, and beat her repeatedly to the point of bruising and discoloration all over her body. *Id.* Whenever Lancaster attempted to escape from Montesi's control, such as by fleeing to another state, he would track her down and forcibly bring her back to his home. *Id.* It was even alleged that on one of these occasions in which she was being "reeled in" by Montesi she attempted to commit suicide by jumping from the moving car in which they were traveling. Thus, it would seem under the facts as alleged, that Montesi was clearly on notice of Lancaster's intention to commit suicide if he persisted in treating her as he did. *Id.* (noting that Lancaster had "called a mutual friend, and in the presence of the defendant, related the abuse imposed upon her, and stated that she was going to 'end it all' "). Nevertheless, Montesi persisted to the point where Lancaster took her life by jumping of the Memphis-Arkansas bridge. *Id.*

Immediately prior to taking this action, Lancaster left a note saying: "Ma Ma, I'm sorry. Louis [Montesi] has beat me enough." *Id.* The Supreme Court of Tennessee dismissed the Lancaster family's wrongful death action against Montesi, noting that "[a]lthough it is alleged that she was 'bereft of reason,' it cannot be said that she did not know and understand the nature of her act." *Id.* at 222. The court further held that "if the suicide is during a lucid interval, when [s]he is in full command of [her] faculties but [her] life has become unendurable to [her], it is agreed that [her] voluntary choice is an abnormal thing, which supersedes the defendant's liability." *Id.* (quoting Prosser on Torts § 49 (1955 ed.)).

The distinction drawn in *Lancaster*, harsh as it may appear, followed from an earlier Tennessee Supreme Court opinion which held that a defendant, who falsely and mistakenly accused an eighteen-year old boy "of good standing and reputation" of breaking into his house and stealing money from him, was not liable for causing the boy to hang himself. *Jones v. Stewart*, 183 Tenn. 176, 191 S.W.2d 439, 439 (1946). The court held: "An act of suicide *resulting from a moderately intelligent power of choice*, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues." *Id.* at 440 (quoting *Daniels v. New York, New Haven & Hartford R.R. Co.*, 183 Mass. 393, 67 N.E. 424, 426 (1903)) (emphasis added).

Lest anyone think that Tennessee's proximate cause analysis in suicide cases has softened significantly

over time, both *Lancaster* and *Jones* were cited with approval in *Potts v. First Peoples Bank of Jefferson County*, No. 03A01-9303-CV-00116, 1993 WL 276858 (Tenn.Ct.App. July 22, 1993) (unreported). *Potts*, interestingly enough, involved facts quite similar to those in the instant case. Potts was the executrix of the estate of Ruel Reese, who committed suicide after learning that his daughter had forged his signature to draw money from his bank account and enter into various loan transactions and refinancings with him as guarantor. *Id.* at *1. The amount of money involved was approximately $5,000 in checks and $17,000 in loans. *Id.* After Reese's daughter became delinquent in her loan payments by eight or nine months, the bank instituted collection proceedings against Reese because he was guarantor of the loan. *Id.* The bank allegedly told him that they would "take his house" if he did not make good on the debt. *Id.* Upon learning of the money he owed and of his daughter's deception, Reese became depressed and, although he sought psychological help, ultimately committed suicide about a year later. *Id.* In granting summary judgment in favor of the bank upon Potts's action for wrongful death, the Tennessee Court of Appeals held that "the record shows Mr. Reese understood the nature of his act of suicide and his act *resulted from a moderately intelligent power of choice.*" *Id.* at *3 (emphasis added); *see also id.* ("Dr. Engum, Mrs. Potts's expert, testified there was no question that Mr. Reese intended to end his life and he understood what would be the result of shooting himself.").

Appendix C

If the facts of *Potts*, *Jones*, and especially *Lancaster* (the physical abuse case) do not fit the delirium/insanity exception to the independent-intervening-cause rule, then neither do the facts in the instant case. Particularly in light of the cogency of Mrs. MacDermid's suicide letter, the apparent lucidity of her consultation with Dr. Koomen, and the fact that even her husband did not suspect that she would be driven to suicide, we would be straining to conclude that Mrs. MacDermid's suicide did not result from a "moderately intelligent power of choice" as construed under Tennessee law, even taking into account her documented bipolar disorder condition. Even if this panel were to disagree with the parsimonious way in which Tennessee law cuts off liability in suicide cases, it is not our place to depart from Tennessee precedent in a case applying state substantive law. Accordingly, the magistrate judge's grant of summary judgment in favor of Discover is affirmed.

III

For all of the reasons stated above, we **AFFIRM in part** and **REVERSE in part** the decision of the magistrate judge below. We **REMAND** the intentional infliction of emotional distress claim for further proceedings. We note that our reversal is predicated on a simple alleged fact: that Discover threatened *criminal* prosecution, without a proper basis, to collect a purely

civil debt.[6] Our ruling should therefore not be read as an indictment of credit card companies' lending practices in general. It may well be true that credit card applications–and in particular, on-line credit card applications–are too lightly regulated. For example, maybe it should be more difficult for an applicant to subject a co-signator to substantial debt liability (as appears to have happened here) without express authorization from the co-signator. As the system currently stands, all that is required is an internet connection and knowledge of the co-signator's name, social security number, and address. Likewise, maybe it should take more than just the click of a mouse for an individual who has recently emerged from personal bankruptcy, and who has a mental disorder that manifests itself in bouts of excessive spending on exotic pussycats, to be able to obtain a credit card in the first place. But as potentially troublesome as we might find some of these practices, they do not, in this case, constitute grounds for legal liability against Discover.

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6 We recognize, however, that this is not the only theory MacDermid is entitled to pursue during discovery. Under the notice pleading standard, MacDermid has broadly claimed that Discover's actions constituted outrageous conduct, and our ruling today allows him to pursue this claim further without necessarily limiting it to the threat of criminal prosecution. (In his complaint, for example, MacDermid also alleges that Discover's conduct was outrageous under Tennessee law because the company continued to employ harassing techniques against his wife to collect the debt even after he advised it of her history of mental illness.)

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION FILED MAY 12, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CASE NO. 1:03-0111
JUDGE KNOWLES

DONALD H. MacDERMID, individually and as Administrator of the Estate of NINA KAY MacDERMID,

Plaintiff,

v.

DISCOVER FINANCIAL SERVICES, d/b/a DISCOVER CHARGE CARD,

Defendant.

MEMORANDUM OPINION

I. Introduction and Background

This matter is before the Court upon Defendant's Motion for Summary Judgment. Docket No. 51. Defendant has filed a supporting Memorandum of Law (Docket No. 55), the Deposition of Plaintiff with Exhibits

(Docket Nos. 52, 53, 54) and certain medical records of decedent (Docket Nos. 51-2, 51-3). Defendant has also submitted a Statement of Material Facts (Docket No. 56), to which Plaintiff has responded (Docket No. 58).

Plaintiff has filed a Response in Opposition to the Motion (Docket No. 57), a supporting Legal Memorandum (Docket No. 59), the Affidavit of Dr. John Koomen (Docket No. 60), and Plaintiff's own Affidavit (Docket No. 61).

Plaintiff filed this action individually and as the administrator of the estate of his deceased spouse, alleging, (1) "Outrageous Conduct and Intentional Infliction of Emotional Distress"; (2) "Violation of the Tennessee Consumer Protection Act"; (3) "Fraud and Civil Extortion"; and (4) "Violation of the Fair Debt Collection Practices Act and Common Law Credit Defamation/Libel." *See* Docket Entry No. 1. *Id.*

The gist of Plaintiff's Complaint is that Defendant violated state and federal law in attempting to collect the balances due on several credit cards that were obtained by decedent in Plaintiff's name, and that Defendant's alleged wrongful conduct in attempting to collect the balance of those accounts was the proximate cause of decedent's subsequent suicide. Essentially, Plaintiff avers that decedent, Nina Kay MacDermid, had previously suffered from "a particularly severe form of bi-polar mental disorder," which manifested "with intermittent episodes of manic spending, often for

unusual and non-essential merchandise." *Id.* Plaintiff avers that decedent had made substantial gains in her illness, but that at some point in 2001, decedent submitted a personal application for a credit card via the Internet, seeking a Discover credit card from Defendant. Decedent apparently submitted her husband's name as a co-applicant, without his knowledge or permission.

Plaintiff avers that Defendant issued credit cards to decedent, and that she quickly spent $15,000 "for various bizarre purchases, including expensive, exotic cats." *Id.* Defendant allegedly attempted to collect the amounts due on the credit card accounts from Plaintiff, whereupon he protested that he had never applied for, nor authorized his wife to apply for, Discovery credit cards in his name. Plaintiff avers that, as result of Defendant's attempts to collect the balances due on the credit cards, and because of her fear of being criminally prosecuted for failing to pay the amounts due, decedent committed suicide on June 13, 2003. *Id.*

Specifically, Plaintiff's Complaint avers that Defendant engaged in outrageous conduct "in using false descriptions of the law; threats of criminal prosecution; and threats of embarrassment and civil suit against both the Plaintiff, and his deceased wife, in an attempt to force the parties' payment of a debt which, at best, was only civilly chargeable to Mrs. MacDermid." *Id.* Plaintiff further maintains that, "Defendant's practice of soliciting, and processing, purported binding credit applications by the Internet, with no mechanism

. . . for obtaining a signature of all purported obligors, is a practice which intentionally and routinely violates the provisions of the Tennessee Statute of Frauds," and "constitutes a purposeful and willful violation of Tennessee law, which is likely to, and in fact, does cause confusion and deception to the consumer, and is an inherently deceptive practice." *Id.* Plaintiff also contends that, "Defendant's threat of criminal prosecution, in aid of its efforts to collect an unlawful debt, constitutes civil extortion, and is a violation of the Fair Debt Collection Act." *Id.* Plaintiff additionally argues that, "Defendant's repeated and (legally incorrect) statements that the Plaintiff was obligated for the debt which he properly refused to pay unfairly and illegally caused harm to his credit and to his general business reputation." *Id.* Finally, Plaintiff maintains that, "since Plaintiff Don H. MacDermid never signed, or reviewed, any application which contained the federally mandated disclosures set forth in the Truth in Lending Act . . . the Defendant's efforts to impose civil liability on the Plaintiff, and their statement to merchants and other persons affirming the validity of the debt, constitute violations of the Federal Truth in Lending Regulations. . . ." *Id.* Plaintiff seeks one million five hundred thousand dollars ($1,500,000.00) in compensatory damages, two hundred fifty million dollars ($250,000,000.00) in punitive damages, as well as treble damages, and attorney's fees. *Id.*

Defendant previously filed a Motion to Dismiss Plaintiff's claims. Docket No. 9. In a Memorandum Opinion entered September 20, 2004, the Court dismissed Plaintiff's claims concerning outrageous

conduct/intentional infliction of emotional distress, Tennessee Consumer Protection Act, fraud, civil extortion, Fair Debt Collection Practices Act, and Truth In Lending Act. The Court also granted the Motion concerning Plaintiff's credit defamation/libel claim, to the extent that that claim pertained to credit reporting agencies. The Court allowed that claim to proceed, however, to the extent that it pertained to third persons other than credit reporting agencies.

The Court, however, denied the Motion with respect to Plaintiff's wrongful death claim. The Court essentially held that, because it was required to take the allegations of Plaintiff's Complaint and Amended Complaint in the light most favorable to Plaintiff, and to accept all well-pleaded allegations of fact as being true, the wrongful death claim could survive the Motion to Dismiss. The Court stated in pertinent part as follows:

> For the purposes of the instant Motion to Dismiss, therefore, Plaintiff informed Defendant of decedent's debilitated physical and mental condition; Plaintiff informed Defendant that decedent's debilitated condition was directly caused by Defendant's actions; Defendant continued its collection efforts; Decedent's condition worsened to the point of requiring psychiatric hospitalization; Decedent took her own life; and, *at the time of her suicide, decedent did not understand the nature of her actions.*

Docket No. 19, p. 13 (emphasis added).

In the instant Motion, Defendant asks the Court to revisit this issue, but this time with the benefit of a number of undisputed facts that have been developed in discovery. Defendant also seeks summary judgment concerning Plaintiff's credit defamation/libel claim.

II. Undisputed Facts

The following facts are undisputed.[1]

In August 2002, Nina Kay MacDermid, using the "family computer" located upstairs in the home which she shared with her husband, Donald H. MacDermid, went on-line to the Discover Card web site and filled out an application requesting a credit card. She provided her personal information as well as personal information of her husband, like his Social Security number. She submitted the application for her husband as the primary card holder and herself as an authorized buyer.

Subsequently, Mrs. MacDermid went on-line again in August and then in September and applied for two

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1. These facts are set out in Defendant's Memorandum in Support of its Motion for Summary Judgment and in Plaintiff's Responses to Defendant's Statement of Material Facts. With regard to the facts set forth in Defendant's supporting Memorandum, Plaintiff has not disputed any of those facts in his Response to the Motion for Summary Judgment. Additionally, Defendant submitted 39 material facts in support of its Motion for Summary Judgment, only one of which (No. 30) was denied, and that fact was denied "as an excerpt out of context." *See* note 3, *infra*.

more Discover cards in her husband's name, providing Discover with his personal information and requesting that the cards be issued with him as the primary card holder and her as an authorized buyer. In order to be able to receive these credit cards from Discover without her husband's knowledge, she obtained a post office box in Linville, Tennessee. These cards were subsequently issued to her and she was able to intercept them and use them without her husband's knowledge.[2]

Mrs. MacDermid made numerous purchases using her Discover cards. These purchases ranged from every day necessities such as gas and computer products to exotic cats.

Unbeknownst to Discover, Mrs. MacDermid had a long history of mental illness. She had been diagnosed in the early 1990's as having bipolar disease and being manic depressive. She underwent drug and alcohol counseling at Parthenon Pavilion (a Nashville psychiatric hospital) in the early 1990's. According to her husband, she continued to struggle with drug and alcohol problems into their marriage.

Mrs. MacDermid also had a history of manic spending sprees. She had previously run up credit card debt requiring her to file personal bankruptcy in the

2. Defendant accepts as true, for the purposes of the Motion for Summary Judgment, Mr. MacDermid's statement that he did not authorize any of these cards and that he did not know about the existence of any of these Discover cards issued in his name until February 2003.

late 1990's. After her discharge from bankruptcy, her husband, who had helped her by paying off some of her debts, forbade her from having any credit cards.

After her bankruptcy, Mrs. MacDermid was on a "cash only basis." She was not working, and her husband would provide her with money for purchases which he felt were warranted. Hence, she surreptitiously obtained not only these three Discover cards, but also cards from American Express, Household Bank, and Chase, among others. According to Mr. MacDermid, his wife obtained all of these credit cards essentially the same way that she did the Discover cards (*i.e.*, without his knowledge, and in his name, using his personal information).

On February 14, 2003, Mr. MacDermid intercepted checks which had been sent to his residence by Discover. Mr. MacDermid confronted his wife about these checks and she denied having any knowledge of them. He admits that he was angry. In his notes concerning the incident, Mr. MacDermid states that he had a "stressful confrontation" with his wife. He explained in his deposition that, "It was, you know . . . to my knowledge, I confronted her with it and that would be stressful to her, very stressful, under the circumstances."

Two days later, Mr. MacDermid found his wife in bed "in a near death condition." Mrs. MacDermid was admitted to Maury Regional Hospital on February 16, 2003, where she remained for five days until her discharge on February 21, 2003. The medical records

list her discharge diagnosis as "acute narcotic overdose" and "anoxic brain injury." The records also indicate that she had "battled bipolar disease for about a decade."

Shortly after his wife was admitted to the hospital, Mr. MacDermid "went through [his wife's] stuff" when he "got back home from the hospital." He found a number of credit cards and statements showing that she was delinquent on a number of different credit cards.

After Mr. MacDermid found these credit cards he "cancelled them." He "called each one and cancelled them and wrote letters to each one."

On March 1, 2003, Mr. MacDermid wrote a letter to Discover Financial Services. A true and correct copy of this letter is attached to the transcript of Mr. MacDermid's deposition as Exhibit 14. This letter states in pertinent part as follows:

> This is to confirm that the credit cards noted above, or any other credit instrument in my name to you, is not and has never been authorized nor requested by me. I was unaware of the cards, or you listing me as cardholder. I have not used them. I have not benefitted from it in any way, to the best of my knowledge.

In this letter, Mr. MacDermid also states that "I have never signed any request, authorization to open, or authorization for anyone else to obtain or use your cards."

Appendix D

Mr. MacDermid does not dispute the fact that his wife obtained these Discover cards and purchased goods with them. He also admits that she was ultimately responsible for paying them.

After Mrs. MacDermid was released from the hospital, she was under the care and supervision of psychiatrist Dr. John Koomen. On Wednesday, June 11, 2003, two days before she committed suicide, she visited with Dr. Koomen. Sometime around that visit, she purchased a handgun. On June 13, 2003, Mrs. MacDermid used this newly-purchased handgun to commit suicide.

Mrs. MacDermid hand wrote a note for her husband, which Mr. MacDermid found after she had killed herself. This note, which is undated, states as follows:

> Dear Don,
>
> The pressure just got the best of me. I got to where I could not even function any more. I am so sorry I let the house go, and everything, please forgive me. I really do love you, but I just cannot take this kind of pressure, and humiliation any longer. I am so sorry for all the worry I have caused you Don, I just wish we were back at the old church once again. I really do love you. I am so sorry to do this to us, but I am not me any more Don. I do not want to take your money either. We should

> have spent more time together, some vacations, and not all work. I stayed here by myself way too much. I feel like I am having a nervous breakdown. I keep the shakes all the time, and numbness all through my body and paranoid, that is no way to live. I will always love you, your wife Kay.

Mr. MacDermid testified that he was shocked and surprised by his wife's suicide. He testified that she did not act any differently in the weeks leading up to her suicide.[3] Mr. MacDermid did notice that his wife was "perhaps a little more relaxed." She did not have any conversation with him that, in hindsight, he thinks was

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3. The statement, "He testified that she did not act any differently in the weeks leading up to her suicide" was set forth as Item No. 30 in Defendant's Statement of Material Facts. Plaintiff denied this Statement of Fact "as an excerpt out of context." Docket No. 58, p. 8. The Court notes, however, that Plaintiff testified as follows in his deposition:

> Q. [BY MR. CAREY] Did your wife act any differently than she had in the day or two days prior to her suicide?
>
> A. Immediately before? No. You know. I couldn't detect anything going on.
>
> Q. So as far as you could detect, your wife was acting the same as she had been for months?
>
> A. Yeah. Perhaps a little more relaxed. And that's typical, which 8 I didn't know.

Docket No. 53-3, p. 4-5 (Deposition page numbers 146-47).

out of character, or that indicated she was contemplating suicide or trying to say goodbye. Mr. MacDermid plainly admitted that "I didn't see it coming. I'll put it that way, in my own perspective."

Mr. MacDermid did not think that her friends or family foresaw that she was going to commit suicide. He testified that certainly if his wife's mother thought that she would commit suicide, then her mother would have done something about it.

Mr. MacDermid was not specifically warned by Dr. Koomen, his wife's treating psychiatrist, that suicide was an imminent threat. Dr. Koomen did not tell Mr. MacDermid to take any specific precautionary measures to prevent his wife from taking her own life. Mr. MacDermid had a number of guns, including handguns, in the house, all of which were fully accessible to his wife. Dr. Koomen did not suggest to Mr. MacDermid that he should not have guns in the house.

In addition, Mrs. MacDermid had full access to all of her medication and was administering all of her medication herself, even though she had been hospitalized in February for an "acute narcotic overdose." Mr. MacDermid stated that he "wasn't really looking for a suicide." Mr. MacDermid further explained, "Nobody saw it coming to the extent that they would, you know, overtly do something about it, which would be saying, you know, Hey, you're in danger. I didn't see it. Nobody else did."

Appendix D

The last contact that Mr. MacDermid had with anyone from Discover was "probably a phone call . . . at least a week or two weeks prior to [the] suicide." Although he was not positive, Mr. MacDermid thought that the last contact that either he or his wife had with Discover was some time in May 2003.

Plaintiff has submitted the Affidavit of Dr. Koomen, which states in pertinent part as follows:

> As my attached hand-written notes indicate, Ms. MacDermid was primarily concerned by the recent allegation by a credit card creditor that she had been guilty of "credit card fraud." That reference appears on pages one (1) and two (2) of the "Initial Psychiatric Assessment" conducted by me at the commencement of my evaluation and treatment of Ms. MacDermid [which is dated 3/6/03].
>
> During my initial interviews with Ms. MacDermid and in the ensuing weeks through April and May of 2003, Ms. MacDermid voiced apprehension over the allegations against her by the credit card company which was accusing her of credit card fraud. She was terrified at the prospect of going to jail and causing further embarrassment to her family, particularly her husband. While I did not discuss the specifics of the threats of jail with Ms. MacDermid, I

note that she was preoccupied with the allegations of credit card fraud, and that it appeared to be the primary stressor which contributed to the deterioration of her emotional and mental condition in April and May of 2003. Subsequent to her self-inflicted gunshot death on June 13, 2003, it was reported to me by Mr. Don MacDermid, her husband, that she had just been threatened with immediate jailing by credit representatives of Discover Card, and that her fear and embarrassment related to the threat of incarceration appeared to be paramount in the voiced fears which led to her suicide.

. . .

Based upon my review of the psychiatric records of Nina Kay MacDermid, my personal involvement in her psychiatric care from March of 2003 through the date of her death in June 2003, and upon the history of the threat of immediate jailing by collection agents for Discover Card, it is my opinion that it is more probable than not, within reasonable medical certainty, that the significant precipitating factor in the causation of the death of Nina Kay MacDermid were the threats of criminal fraud prosecution and incarceration by the collection representatives. In the absence of

> the threats of arrest and incarceration, I believe that it is more probable than not, within reasonable medical certainty, that Ms. MacDermid could have maintained her rational thought processes, and the condition could have been stabilized, as it had many times in the past, through continued counseling and appropriate medication. My office provided appropriate care, supervision, and treatment to Nina Kay MacDermid throughout our relationship with Ms. MacDermid. All care provided by my office, and under my supervision, was consistent with the local standard of care in the Columbia, Maury County, Tennessee medical community.

III. Summary Judgment Standards

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To prevail, the moving party must meet the burden of proving the absence of a genuine issue as to material fact concerning an essential element of the opposing party's claim. *See Celotex v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed. 2d 202 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). In determining whether the moving party has met its burden, the court

must view the evidence in the light most favorable to the nonmoving party. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Fed. R. Civ. P. 56 provides that the non-moving party may not rest upon the mere allegations or denials of his or her pleading, but his or her response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. If a non-moving party, however, fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial, there is no genuine issue as to any material fact because a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. When this occurs, the moving party is entitled to summary judgment as a matter of law. *Id.* at 322-23; *Williams v. Ford Motor Co.*, 187 F.3d 533, 537-38 (6th Cir. 1999).

IV. The Wrongful Death Claim

Plaintiff's claim for wrongful death is based upon a theory of negligence.[4] In order to establish a prima facie

4. While Plaintiff never specifically mentions "negligence" in his Complaint, he clearly seeks to recover for the wrongful death of his wife. Because Plaintiff never avers in his Complaint that Defendant intentionally killed decedent, his wrongful death claim must be based upon a theory of negligence. (Cont'd)

claim of negligence under Tennessee law, Plaintiff must prove the following elements: (1) a duty of care owed by Defendant to Plaintiff; (2) conduct by Defendant falling below the standard of care amounting to a breach of the duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. *Coln v. City of Savannah*, 966 S.W.2d 34-39 (Tenn.1998) (citation omitted). Defendant argues that Plaintiff cannot prove either breach of duty or proximate cause. The Court need not address the breach of duty question, however, because the Court agrees that Plaintiff cannot establish proximate cause.

The concept of "proximate" or "legal" cause is a judicial mechanism by which courts "establish a boundary of legal liability." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn 1993). *See also Rains v. Bend of the River*, 124 S.W.3d 580, 592 (Tenn.Ct.App.2003). This policy decision is based on considerations of "logic, common sense, policy, precedent and other more or less inadequately expressed ideas of what justice demands and of what is administratively possible and convenient." *Rains*, 124 S.W.3d at 592 (citing *White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn.1998); *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252, 256 n. 6 (Tenn.1997)). Generally stated, proximate cause is established if "the conduct is a substantial factor in

(Cont'd)
Plaintiff's Response to the instant Motion for Summary Judgment (Docket No. 59) does not dispute the fact that this claim is based upon negligence.

bringing about the harm and there is no rule of law relieving the actor from liability." *Id.* (citing *Smith v. Gore*, 728 S.W.2d 738, 749 (Tenn.1987); *Waste Mgmt., Inc. of Tenn. v. South Cent. Bell Tel. Co.*, 15 S.W.3d 425, 431 (Tenn.Ct.App.1997); RESTATEMENT (SECOND) OF TORTS § 431 (1965)).

Tennessee courts have considered the issue of proximate cause in a number of cases involving suicide. In *Rains, supra*, the Tennessee Court of Appeals extensively discussed Tennessee case law concerning such cases. The Court summarized Tennessee law in this area, in part as follows:

> One of the rules of law that will relieve a negligent actor from liability is the doctrine of independent intervening cause. This doctrine, which survived the Tennessee Supreme Court's adoption of comparative fault, provides that a negligent actor will be relieved from liability when a new, independent and unforeseen cause intervenes to produce a result that the negligent actor could not have reasonably foreseen. . . . It is premised on the concept that the independent intervening cause breaks the chain of legal causation between the original negligent actor's conduct and the eventual injury. . . . The doctrine applies only when the intervening act (1) was sufficient by itself to cause the injury, (2) was not reasonably foreseeable to the negligent actor, and (3) was not a normal response to the negligent actor's conduct. . . .

Foreseeability is the key here because no person is expected to protect against harms from events that he or she cannot reasonably anticipate or foresee or which are so unlikely to occur that the risk, although recognizable, would commonly be disregarded. . . . As a general matter, an actor has much less reason to anticipate intentional misconduct than negligence Accordingly, the Tennessee Supreme Court has held that injuries are even less foreseeable when they result "from an act committed by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence." . . .

Tennessee's courts, like other state and federal courts, have consistently recognized that the independent intervening cause doctrine may properly be invoked in cases involving self-inflicted injury or death. Like courts in other jurisdictions, they have also recognized the following three exceptions to this general rule: (1) circumstances in which the defendant's negligence causes delirium or insanity that results in self-destructive acts, . . . (2) custodial settings in which the custodian knew or had reason to know that the inmate or patient might engage in self destructive acts, . . . and (3) special relationships, such as a physician-patient relationship, when the

> caregiver knows or has reason to know that the patient might engage in self-destructive acts.

124 S.W.3d at 593-94 (citations and footnote omitted).

Plaintiff acknowledges the foregoing general rule and the exceptions to it.[5] Plaintiff relies upon the first exception discussed above. That exception, however, does not apply in the case at bar.

There is simply no medical proof in this case to show that Defendant's conduct caused a delirium or insanity in decedent. Dr. Koomen's Affidavit says nothing about "delirium," or "insanity." Despite Plaintiff's statement to the contrary, there is simply nothing in Dr. Koomen's Affidavit to support the proposition that Defendant's threats of prosecution and jail "caused a significant deterioration in [Plaintiff's] rational thought process." Likewise, there is nothing in Dr. Koomen's Affidavit showing that decedent was rendered "bereft of reason."

The *Rains* Court also discussed the importance of foreseeability in connection with independent intervening cause in cases involving suicide. Although Plaintiff does not discuss the foreseeability issue as such, the Court believes it is appropriate to briefly address that issue.

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5. Plaintiff erroneously cites *White v. Lawrence*, 975 S.W.2d 525 (Tenn.1998) as authority for these propositions.

Appendix D

The Tennessee Supreme Court, in *White v. Lawrence*, 975 S.W.2d 525 (Tenn.1998), discussed independent intervening cause in a suicide case primarily in terms of foreseeability. *White* involved a situation in which Plaintiff's decedent sued a physician who had treated decedent for alcohol addiction and depression. The physician prescribed a drug to discourage decedent from drinking. Apparently, however, the physician instructed decedent's wife to grind the medication and surreptitiously place it in decedent's food. Shortly after decedent started taking the medication, he apparently began drinking, experienced pain and hot flashes, and went to a local emergency room. Because he did not know he had taken the medication that had been prescribed surreptitiously, he did not advise emergency room personnel of that fact. He was diagnosed as suffering from heat exhaustion and was discharged. Four hours later he committed suicide.

Plaintiff in *White* presented expert medical proof to support the proposition that the covert administration of the drug, under the circumstances, was "entirely inappropriate, violate[d] the standard of care, and [was] dangerous to the point of recklessness." 975 S.W.2d at 528. Under those circumstances, the *White* Court analyzed the issue as one of foreseeability, stating in pertinent part as follows:

> As the expert testimony in this case demonstrates, the foreseeability or likelihood of a suicide does not necessarily depend upon

the mental capacity of the deceased at the time the suicide was committed. The fact that the deceased was not insane or bereft of reason does not necessarily lead to the conclusion that the suicide, which is the purported intervening cause, is unforeseeable. As our cases dealing with proximate or legal causation have indicated, the crucial inquiry is whether the defendant's negligent conduct led to or made it reasonably foreseeable that the deceased would commit suicide. If so, the suicide is not an independent intervening cause breaking the chain of legal causation.

. . .

The record in this case shows that reasonable minds could conclude that the decedent's act of suicide was a foreseeable consequence of the defendant's negligence in surreptitiously prescribing and administering the [drug involved]. The record shows that leading risk factors for suicide include physical illness and depression. The decedent suffered from both. The plaintiff presented medical proof that the decedent's suicide was reasonably foreseeable from a medical standpoint, and that the defendant's conduct was a substantial factor in bringing about the suicide.

Id.

In the case at bar, there is absolutely no expert medical proof that decedent's suicide was a reasonably foreseeable result of any act or omission of Defendant.

V. Credit Defamation

As discussed above, the Court previously dismissed Plaintiff's claims concerning "credit defamation" to the extent that those claims related to credit reporting agencies. The Court declined to dismiss the credit defamation claim, however, to the extent that Defendant may have made false statements to third persons (other than credit reporting agencies) that harmed Plaintiff's credit and general business reputation.

Defendant now seeks summary judgment on this claim, arguing that Plaintiff cannot establish a prima facie case of defamation. In order to establish a prima facie case of defamation, Plaintiff must show that: (1) Defendant published a statement; (2) with knowledge that the statement was false and defaming to Plaintiff; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement. *See Sullivan v. Baptist Memorial Hospital*, 995 S.W.2d 569, 57 (Tenn.1999). As Defendant argues, Plaintiff has not specifically set forth the exact statements Defendant allegedly made to third parties about him and/or his "credit" that were defamatory.

Plaintiff responds to this argument by relying upon the allegations of his Complaint. As discussed above, however, when a party makes a properly supported

Motion for Summary Judgment, the opposing party cannot simply rely upon the allegations of his Complaint.

Defendant has clearly argued that Plaintiff cannot prove specific false statements made to third parties. Plaintiff simply has not responded to that argument with specific and concrete statements made to third parties.

Moreover, in both libel and slander actions, a plaintiff must prove actual injury unless constitutional malice is shown. *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn.1978). Plaintiff has produced no evidence of any specific pecuniary losses as a result of any alleged defamation. Plaintiff completely fails to address *Nichols*, and Plaintiff has completely failed to show any pecuniary loss.

VI. Possible Reinstatement of Dismissed Claims

In his Response to Defendant's Motion for Summary Judgment, Plaintiff apparently asks the Court to reconsider its previous decisions to dismiss Plaintiff's claims based upon intentional infliction of emotional distress and violation of the Tennessee Consumer Protection Act. (T.C.A. § 47-18-101 *et seq.)*. Docket No. 59, p. 2. Plaintiff, however, has not filed a separate Motion asking the Court to reconsider these issues. As a practical matter, the Court would discourage litigants from seeking relief in legal memoranda, especially in legal memoranda that oppose a properly-filed Motion. If parties seek specific relief or a specific ruling from

the Court concerning an issue, they should do so in a Motion. Even if the Court were to reconsider these issues, however, the Court would not change its previous rulings.

Plaintiff never specifically addresses the issue of intentional infliction of emotional distress. Thus, the Court will decline to revisit its prior ruling on that issue.

Moreover, Plaintiff's argument concerning the Tennessee Consumer Protection Act appears to be that Defendant violated that Act by threatening criminal prosecution of decedent and/or Plaintiff himself. Docket No. 59, p. 13-14. This claim, however, is not the claim that was raised by Plaintiff in his Complaint in this case. In his Complaint, Plaintiff argued only that Defendant's practice of soliciting and processing binding credit applications by the Internet violated the Consumer Protection Act. Docket No. 1, p. 5-6. In reality, Plaintiff's argument is not that the Court should "reconsider" its previous ruling, because the Court's previous ruling had nothing to do with the claim Plaintiff now seeks to assert under the Tennessee Consumer Protection Act. Plaintiff has not filed a Motion to Amend his Complaint to allege such a claim, and the Court notes that the deadline for filing Motions to Amend was August 15, 2004. Docket No. 14, p. 4.

For the foregoing reasons, the Court respectfully declines to revise its prior decision dismissing Plaintiff's claims for intentional infliction of emotional distress and Plaintiff's claims under the Tennessee Consumer Protection Act.

Appendix D

VII. Conclusion

For the foregoing reasons, the Court concludes that there is no genuine issue to any material fact, and that Defendant is entitled to a judgment as a matter of law with regard to Plaintiff's negligence/wrongful death and credit defamation claims.

An appropriate Order will be entered.

s/ E. Clifton Knowles
E. Clifton Knowles
United States Magistrate Judge

Supreme Court, U.S.
FILED
DEC 18 2009
OFFICE OF THE CLERK

No. 09-598

IN THE

Supreme Court of the United States

DONALD H. MACDERMID, individually and as Administrator of the Estate of Nina Kay MacDermid,

Petitioner,

v.

DISCOVER FINANCIAL SERVICES, d/b/a DISCOVER CHARGE CARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Morgan Stanley is the ultimate parent of Respondent Discover Financial Services LLC, now known as DFS Services LLC. No other publicly held company owns 10% or more of the stock of the Respondent.

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I. STATEMENT OF THE CASE

Pursuant to Rule 15 of the Supreme Court Rules, Respondent Discover Financial Services LLC ("Discover") submits this Response in Opposition to the Petition for Writ of Certiorari (the "Petition") filed by Petitioner Donald H. MacDermid, Individually and as Administrator of the Estate of Nina Kay MacDermid. There is no basis for granting the Petition, and it should be denied.

A. The Petition Fails to Address the Criteria Set Forth in Rule 10

The Petition is fundamentally flawed in that Petitioner fails even to set forth, much less attempt to rely upon, any of the considerations governing review on writ of certiorari provided in Rule 10 of the Supreme Court Rules. As that Rule notes, "[R]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Rule 10 then sets forth three factors meant to "indicate the character of the reasons the Court considers . . ." *Id.* Those three factors are:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial

> proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id.

In the Petition, Petitioner fails to cite or rely upon any of the factors set forth in Rule 10. Here, there is no conflict between the federal circuits or between state and federal courts, no federal question or federal law at issue, and no need for the exercise of this Court's supervisory power over a lower court. At best, the errors Petitioner asserts consist of "erroneous factual findings or the misapplication of a properly stated rule of law," which are alleged errors that this Court rarely decides to review. *Id.* Because none of the factors set forth in Rule 10 are applicable here, this Court should deny the Petition.

B. The Petition Erroneously Represents Certain Key Facts

While, as noted above, this Court rarely seeks to correct erroneous factual findings via discretionary review, many of the alleged errors of which Petitioner complains are not in fact errors at all. Rather, the Petition itself erroneously represents certain key facts in this matter. For example, in the fourth paragraph on page *i* the Petition states: "Mrs. MacDermid applied in her husband's name, as a co-obligor, but stated no false facts." This statement is incorrect in that Mrs. MacDermid did not apply as a co-obligor, and did state false facts.

As the United States Court of Appeals for the Sixth Circuit noted in its opinion, it was a violation of the terms of Discover's online credit card application to "request issuance of a Discover credit card in a party's name without that party's consent or knowledge." [Appendix A, p. 2a]. In each of the three applications for credit cards submitted by Nina Kay MacDermid, she listed her husband, Petitioner, as the "Primary Applicant" and listed herself as an "Authorized Buyer." [*Id.*]. As a result, all three credit cards were established as individual accounts in Mr. MacDermid's name rather than as joint accounts belonging to both Mr. and Mrs. MacDermid. [*Id.*]. Moreover, Mr. MacDermid conceded that he did not apply for the credit cards, and that the applications submitted to Discover were made without his knowledge or permission. [*Id.*]. Petitioner's statement that Mr. and Mrs. MacDermid were "co-obligors" on the Discover credit card accounts is thus incorrect - Mr. MacDermid was the only account holder, and Mrs. MacDermid was

listed merely as an authorized buyer. Further, Petitioner's statement that there were no false facts set forth in the application is incorrect. The terms of use of the Discover website, not surprisingly, prohibit applications submitted without a party's consent and knowledge. The Petitioner acknowledged below that he did not apply for the credit cards issued in his name and was not aware of the applications. Indeed, the applications in issue are the very embodiment of a false statement of fact as they were submitted without the alleged applicant's knowledge, and were therefore fraudulent.

In addition, Petitioner makes other statements that are unsupported by the record in this case. For example, Petitioner states that, "[D]iscover intensified a campaign of harassment and threats, which included repeated threats of criminal prosecution and jail, if the bill was not paid." [Petition, p. 7]. Calling the collection efforts which occurred "a campaign of harassment and threats" is rank hyperbole intended to cast Petitioner's case in a light not supported by the record.

II. RESPONSE TO PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

Petitioner appears to present three questions for the Court's review on page *i* of his Petition. However, those questions do not relate to the legal or factual issues decided below, but rather appear to be purported policy arguments which Petitioner attempts to link to the current economic climate. While Respondent believes that Petitioner has chosen the wrong forum (and indeed, the wrong branch of government) in which to

advance such arguments, Respondent will briefly address each question along with an explanation of why the question is inappropriate for this Court's review.

A. Limitations on the Conduct of a Credit Card Collection Representative

Petitioner relies upon the case of *Hyatt v. People*, 188 U.S. 691, 23 S. Ct. 456, 47 L. Ed. 657 (1903), and the "nation's current economic climate" in an attempt to cast the Petition as one involving broadly applicable principles of debtor/creditor law. This argument fails to acknowledge that the only claim at issue below was a single common law claim for outrageous conduct (a/k/a intentional infliction of emotional distress) under Tennessee law. Further, this case involves an allegedly mentally ill woman who committed suicide, leaving behind a note that did *not* mention Discover, credit cards, collection efforts, threats of jail, or fear of incarceration. [Appendix A., p. 4a].

Petitioner argues that the decisions below, when evaluated in the context of *Hyatt*, leave the law "unsettled." This is incorrect, because the facts of this matter are unique and fundamentally different than those present in *Hyatt* or in the context of general debtor/creditor law. As a result, the question is inappropriate for this Court's review.

B. Subsequent Review by a Court of Appeals Panel

The second question presented for review, i.e., whether *stare decisis* prohibits a subsequent appellate

panel from disregarding a prior decision in the same case, implies that the Court of Appeals made inconsistent findings in the two separate appeals of this case to that Court and that *stare decisis* barred the second decision issued August 18, 2009. This argument ignores the fact that in the first Court of Appeals decision, the Court found only that it could not agree with "dismissal of the outrageous conduct claim at the 12(b)(6) stage," but agreed that "Tennessee's outrageous conduct standard, as in many states, is a formidable one." [Appendix C., p. 50a and 57a]. The second decision of the Court of Appeals, which affirmed the grant of summary judgment to Respondent, is not contrary to the first decision because the undisputed facts had been developed at that stage and the Court of Appeals concluded on the basis of those facts that "Discover's legitimate threats of criminal prosecution against [Mrs. MacDermid] during debt collection failed to constitute outrageous conduct as a matter of law." [Appendix A, p. 26a].

Petitioner is apparently arguing that, because the Court of Appeals once found that Discover did not meet the Federal Rule of Civil Procedure 12(b)(6) standard for dismissal of a claim, Discover could *never* develop undisputed facts sufficient to allow it to prevail on a Motion for Summary Judgment pursuant to Rule 56. Petitioner's argument in this regard is without merit. In response to the original Court of Appeals decision, Discover developed additional facts through the discovery process and subsequently moved on the basis of such facts for summary judgment on the remaining claim of outrageous conduct. The District Court granted Discover's Motion for Summary Judgment. On appeal from the District Court's denial of Petitioner's Motion

to Alter or Amend the Order granting Discover's Motion for Summary Judgment, the Court of Appeals considered the undisputed facts and the summary judgment standard and affirmed the District Court's decision to deny Petitioner's Motion to Alter or Amend. [Appendix A, p. 27a]. The law of *stare decisis* is simply not implicated in this case because the prior decision of the Court of Appeals addressing a Rule 12(b)(6) motion to dismiss was not relevant to or binding on the subsequent panel examining a different record under the Rule 56 summary judgment standard. Consequently, this Court should not grant review of this question.

C. Limitations on Threatening Words Used in the Collection of Credit Card Accounts

Just as with Petitioner's first question for review (which appears not to differ from this question), Petitioner argues that "limitations" should be imposed on threatening criminal prosecution in collection of a debt. Respondent submits that these limitations already exist, and the limitations and exceptions to such limitations were acknowledged and discussed in some detail by the courts below. As to the precise conduct at issue here, i.e., whether a creditor can threaten to pursue criminal prosection, the courts below both held that a creditor can be justified in threatening criminal prosecution if a crime has indeed been committed. [Appendix A, p. 26a]. The District Court and Court of Appeals both applied the undisputed facts to the applicable Tennessee criminal statutes and found that probable cause existed to prosecute Mrs. MacDermid under the applicable Tennessee criminal statutes. As a

result, the Court of Appeals found that any alleged threats of criminal prosecution of Mrs. MacDermid were legitimate and failed to constitute outrageous conduct as a matter of law. [Appendix A., p. 26a]. Discover respectfully submits that this Court should not grant review of this question.

III. CONCLUSION

Respondent Discover Financial Services LLC respectfully submits that this Court should deny the Petition for Certiorari because the Petition fails to demonstrate any reason for further review of the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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